APPENDIX A

Opinion of the Supreme Court of New Jersey, dated May 6, 1982

SUPREME COURT OF NEW JERSEY

A-102 September Term 1981

RESORTS INTERNATIONAL, INC., a corporation organized and existing under the laws of the State of Delaware, and RESORTS INTERNATIONAL, HOTEL, INC., a corporation organized and existing under the laws of the State of New Jersey,

Plaintiffs-Respondents,

v.

NJM ASSOCIATES, A New Jersey limited partnership, doing business as the NEW JERSEY MONTHLY, NJM PUBLISHING COMPANY, a corporation organized and existing under the laws of the State of New Jersey, as a General Partner in NJM ASSOCIATES, CHRISTOPHER LEACH, Individually, as Editor-In-Chief of NEW JEREY MONTHLY and as a general partner in NJM ASSOCIATES, HENDRIX F.C. NIEMANN, Individually and as Publisher of NEW JERSEY MONTHLY, MICHAEL ARON, Individually and as Editor of NEW JERSEY MONTHLY, MICHAEL DORMAN, and JOHN COE, MARY DOE, STEVE ROE, and other individuals as yet unknown, Names Being Fictitious, Individually and as agents, servants and/or employees of NEW JERSEY MONTHLY,

Defendants-Appellants.

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Argued January 11, 1982—Decided May 6, 1982.

On certification to the Superior Court, Law Division, whose opinion is reported at 180 N. J. Super. 459 (1981).

Alan M. Wallack argued the cause for appellants (*Brener, Wallack & Hill*, attorneys; Mr. *Wallack, Joseph C. Mahon* and *Guliet D. Hirsch*, on the briefs).

Joel H. Sterns argued the cause for respondents (*Sterns, Herbert & Weinroth*, attorneys; *Mr. Sterns* and *Michael D. Loprete*, of counsel; *Mark D. Schorr* on the brief).

The opinon of the Court was delivered by Pashman, J.

This interlocutory appeal concerns the extent to which the New Jersey Shield Law, N.J.S.A. 2A:84A-21, protects against compelled disclosure of sources, editorial processes and other confidential information in a libel action. In *Maressa* v. *New Jersey Monthly, et al.*, —— N.J. —— (1982), decided today, we hold that the Shield Law privilege not to disclose such information in a libel action is absolute. Defendants in this case did not waive the privilege. We therefore reverse the trial court order compelling disclosure of privileged information.

I

This action began after an article entitled "Surrender in Atlantic City" appeared in the May 1979 issue of *New Jersey Monthly* magazine. The article describes the hearing process through which plaintiff Resorts International, Inc. (Resorts) obtained the first permanent license from the Casino Control Commission to operate a gaming casino in Atlantic City.

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The thrust of the article was that the hearings concerning Resorts' application was a charade designed to make Resorts "look clean," despite "a plethora of evidence" establishing that it was a "mismanaged, unscrupulous, mob-tainted company with the morals of an alley cat." The article described Resorts' alleged attempts to secure statewide referenda on casino gambling, its alleged contribution of $250,000 to the pro-casino campaign, and its alleged payment of retainer fees and campaign contributions, some unlawful, to lawyers and politicians involved in the casino law's drafting and passage. The article's author, Michael Dorman, concluded that "it would be an insult to the intelligence of anyone present to pretend that these proceedings resembled serious regulatory deliberations."

On May 30, 1979 an attorney for Resorts wrote to the editor-in-chief of New Jersey Monthly to demand an immediate retraction of what he described as Dorman's "scurrilous, libelous and defamatory" article. The letter identified approximately 40 paragraphs that allegedly contained inaccurate statements. No retraction was published.

This action was filed in the Superior Court, Law Division on April 18, 1980, on behalf of Resorts and its wholly owned subsidiary, Resorts International Hotel, Inc. The suit named as defendants New Jersey Monthly, NJM Publishing Company, Dorman, the magazine's publisher, editor-in-chief, editor, and several John Does. Conceding that it was a public figure for purposes of the litigation, Resorts contended that defendants published the allegedly libelous statements in wilful or reckless disregard of the truth. The defendant's answer raised separate defenses including opinion as fair comment, good faith and lack of malice.

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In June 1980 plaintiffs served upon the defendants interrogatories and demands for the production of documents. Plaintiffs sought a wide range of information, including all notes, memoranda, rough drafts, editorial comments, source names, telephone bills and other documents concerning the allegedly libelous article. While answering some questions and producing some documents, defendants responded to many other requests by stating that the information sought was "privileged".

Plaintiffs moved on September 11, 1980 to compel discovery. Hearings were held on the motion beginning October 17, 1980. On May 5, 1981 the trial judge issued a letter opinion holding that defendants had waived their Shield Law privileges by asserting separate defenses. Following additional argument, the trial judge made separate determinations with respect to each item sought. An order implementing those decisions was entered on June 18, 1981. On June 22, 1981 Dorman was ordered to produce pages from his diaries, with the names of confidential sources masked pending further court orders.

On July 1, 1981 the trial judge entered an amended opinion on the reporters' privilege issues. The order from which this appeal was taken, giving defendants 30 days to answer plaintiffs' discovery requests, was entered on July 7, 1981, and stayed on August 5, 1981 pending interlocutory appeal. We granted direct certification on September 29, 1981.

II

In *Maressa* we hold that the New Jersey Shield Law, N.J.S.A. 2A:84A-21, establishes an absolute privilege in libel actions not to disclose sources, editorial processes

and other confidenial information involved in publication of an alleged libel. The notes, memoranda, rough drafts, editorial comments, sources and other information sought by plaintiffs in this case are included in the Shield Law's protection.

We also find no evidence of waiver. As explained in *Maressa,* publication constitutes a waiver only as to those specific materials published. (Slip op. at 24-27). The fact that defendants in this case responded to the trial court orders by providing additional information, including the names of about 20 sources who had not requested confidentiality, does not waive the privilege as to any other information. Nor did defendants' assertion of separate defenses constitute waiver of Shield Law Protection. (Slip op. at 25).

The trial court order is therefore reversed. Plaintiffs are free to pursue their claim in accord with the law set down in *Maressa* and in this opinion. As we acknowledged in *Maressa,* the Shield Law makes it more difficult for libel plaintiffs to prove their case. However, the Legislature has decided to provide increased protection for news media at the expense of potential libel plaintiffs. This is a legislative choice that the United States and New Jersey Constitutions permit.

Chief Justice Wilentz and Justices Clifford, Handler, Pollock and O'Hern join in this opinion. Justice Schreiber has filed a separate dissenting opinion.

Schreiber, J., dissenting.

I hereby dissent for the reasons expressed in my dissenting opinion filed in *Maressa* v. *New Jersey Monthly,* —— N.J. ——, —— (A-74 September Term 1981).

APPENDIX B

Opinion of the Supreme Court of New Jersey, dated May 6, 1982

SUPREME COURT OF NEW JERSEY

A-74 September Term 1981

JOSEPH A. MARESSA,

Plaintiff-Respondent,

v.

NEW JERSEY MONTHLY and HENDRIX F.C. NEIMANN and CHRISTOPHER LEACH and MICHAEL ARON and TERESA CARPENTER and HARVEY FISHER and ROBERT NARUS, jointly, severally and in the alternative,

Defendants-Appellants.

Argued January 11, 1982—Decided May 6, 1982.

On certification to the Superior Court, Law Division.

Alan M. Wallack argued the cause for appellants (*Brener, Wallack & Hill*, attorneys; Mr. *Wallack* and *Joseph C. Mahon*, on the brief).

Arthur B. Hanson, a member of the District of Columbia Bar, argued the cause for *amicus curiae* American Newspaper Publishers Association (*Jamieson, McCardell,*

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Moore, Peskin & Spicer, attorneys; Mr. *Hanson, Frank M. Northam, Mitchell W. Dale* and *Arthur D. McKey*, members of the District of Columbia Bar, of counsel; *Thomas C. Jamieson, Jr.* and *Frances Goldmark*, on the brief).

Benjamin Goldstein argued the cause for respondent (*Maressa, Goldstein, Birsner & Patterson*, attorneys; Mr. *Goldstein* and *Nancy D. Gold*, on the brief).

Thomas J. Cafferty and *Frances Goldmark* submitted a brief on behalf of *amici Curiae* New Jersey Press Association and the Trenton Times Corporation (*Seiffert, Frisch, McGimpsey & Cafferty* and *Jamieson, McCardell, Moore, Peskin & Spicer*, attorneys).

Peter G. Banta submitted a brief on behalf of *amicus curiae* The Bergen Evening Record Corporation (*Winne, Banta & Rizzi*, attorneys; Mr. *Banta* and *Donald A. Klein*, of counsel).

The opinion of the Court was delivered by Pashman, J.

Twice in recent years, this Court has mediated between a newsperson's right not to disclose confidential information and a criminal defendant's right to compel the production of witnesses in his or her favor. *State* v. *Boiardo*, 82 N.J. 446 (1980); *In re Farber*, 78 N.J. 259 (1978). We have held that the New Jersey Shield Law, N.J.S.A. 2A:84A-21, protects confidential information gathered by news media "to the greatest extent permitted by the Constitution of the United States and that of the State of New Jersey." *Farber, supra*, 78 N.J. at 270. Because criminal defendants have a constitutional right to obtain evidence necessary to their defense, *U.S. Const.*, Amend. 6; *N.J. Const.* (1947), Art. I, par. 10, including confiden-

tial information, we held in those criminal cases that the newsperson's privilege is not absolute.

Today, for the first time since the landmark libel case of *New York Times* v. *Sullivan*, 376 U.S. 254, 11 L.Ed.2d 686 (1964), this Court must decide whether the Shield Law allows newspersons who are sued for libel to refuse to disclose their sources and editorial processes leading to publication of the alleged libel. As in the earlier criminal cases, we must decide here whether a countervailing constitutional right limits the Shield Law. In the present suit, which seeks monetary damages for alleged injury to reputation, we find no such right. We therefore hold that the newsperson's privilege in a civil action for libel is absolute. Since defendants have not waived their privilege, the trial court's order compelling answers to plaintiff's discovery requests must be reversed.

I

The October 1979 issue of *New Jersey Monthly* magazine contains an article entitled "Rating the Legislature" that evaluates the performance of New Jersey legislators. The article discusses several categories of representatives—including "The Best," "The Worst" and "The Drones." Plaintiff, Senator Joseph Maressa, appeared under "The Worst" category. He was described as a "floundering and ineffectual" man whose shortcomings went unnoticed by scores of extremists who, "appealing to Maressa's considerable ego, managed to enlist him as their advocate this term." Describing Maressa as "callous, stupid, and just plain devious," the article's authors listed several incidents upon which they based the senator's low rating. The article claimed that during a Sen-

ate debate of the death penalty, Maressa whined and attempted to cut off debate; that he smuggled an anti-gay lobbyist onto the Senate floor and then lied to the sergeant-at-arms that the lobbyist was his aide; that he was called before the Legislative Ethics Committee; and that he was "shot down" by the Supreme Court Advisory Committee. The article concluded, "Maressa's problem is not so much that he is evil as that he is sneaky, self-interested, and basically unprincipled."

Maressa filed a libel action in the Superior Court, Law Division, on December 12, 1979 against the magazine's owner, publisher, editor-in-chief, an editor and the three reporters who wrote the article. He alleged that the article falsely conveyed to the public that he was unfit to serve the people of New Jersey, and that he had participated in dishonest, illegal and unethical practices. Maressa further alleged that defendants had published the defamatory falsehoods without making reasonable inquiries as to their accuracy, thereby defaming him in reckless disregard of the truth.[1]

This interlocutory appeal arose during pretrial discovery proceedings. On February 11, 1980 plaintiff served interrogatories upon defendants, and on April 8, 1980 plaintiff took the depositions of the three reporter defendants. Maressa sought a broad range of information including names and addresses of all sources interviewed, copies of all rough drafts, notes, questions and memos pertaining to the article, and a summary of what each source told

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[1] Maressa concedes that he is a public figure who must prove defendants' reckless or willful disregard of the truth in order to recover damages for libel. *New York Times* v. *Sullivan*, 376 U.S. 254, 11 L.Ed.2d 686 (1964).

the reporters. Defendants refused to provide any information about their sources or editorial processes. They answered each interrogatory with the word "privileged."

Plaintiff sought an order from the Law Division compelling more specific answers to the interrogatories and deposition questions. On June 27, 1980 the trial court ruled that the responses sought by plaintiff were not privileged; alternatively, the court found that any newsperson's privilege had been waived. Maressa then served upon defendants a supplemental set of interrogatories containing the unanswered questions. After defendants again claimed the newsperson's privilege, the trial court on October 15, 1980 directed them to provide more specific answers within 20 days or face judicial sanctions.

The Appellate Division granted defendants leave to appeal the order compelling disclosure. Before that court heard the appeal, we directly certified the matter on our own motion. R. 2:12-1. We now reverse.

II

The newsperson's privilege in New Jersey dates from a 1933 statute,[2] L. 1933, c. 167; N.J.S.A. 2:97-11. Like other evidentiary privileges, it limits the common law right to compel testimony in judicial proceedings. The Legislature enacts such privileges "because in the par-

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[2] New Jersey courts had not recognized a privilege under common law. In *In re Julius Grunow*, 84 N.J.L. 235 (Sup.Ct. 1913), the court affirmed a $25 contempt fine against a reporter who had refused to divulge his sources, holding that the asserted privilege "finds no countenance in the law."

ticular area concerned, they are regarded as serving a more important public interest than the need for full disclosure." *State* v. *Briley*, 53 N.J. 498, 506 (1969).

Unlike most other privileges, however, a newsperson's privilege has a constitutional foundation. While narrowly upholding a grand jury's right to subpoena reporters, the United States Supreme Court has unanimously recognized that a reporter's gathering of information receives some First Amendment protection. *See Branzburg* v. *Hayes*, 408 U.S. 665, 691 (1972) (opinion of White, J., joined by Burger, C.J., and Blackmun, Rehnquist, J.J.); *id.* at 709 (Powell, J., concurring); *id.* at 712 (Douglas, J., dissenting); *id.* at 725 (Stewart, J., dissenting, joined by Brennan and Marshall, J.J.).

Richmond Newspapers, Inc. v. *Virginia*, 448 U.S. 555, 65 L.Ed.2d 973 (1980), which recognized a First Amendment right to attend criminal trials, reinforced the newsperson's right to gather information:

> whether we describe this right . . . as a 'right of access' . . . or a 'right to gather information,' . . . we have recognized that 'without some protection for seeking out the news, freedom of the press could be eviscerated.'
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> [448 U.S. at 576 (quoting *Branzburg* v. *Hayes*, *supra*, 408 U.S. at 681; additional citations and footnote omitted).]

Lower federal courts have read *Branzburg* as supporting some First Amendment protection for reporters' use of confidential sources. *See, e.g., Bruno & Stillman, Inc.* v.

Globe Newspaper Co., 633 F.2d 583, 594-95 (1st Cir. 1980); *Gulliver's Periodicals, Ltd.* v. *Chas. Levy Circulating Co.*, 455 F.Supp. 1197, 1202 (N.D. Ill. 1978); *see also* Lindberg, *Source Protection in Libel Suits*, 81 *Colum.L.Rev.* 338 (1981).

Federal constitutional protection of news gathering, however, gives newspersons only a qualified privilege not to reveal sources and other confidential information. In *Branzburg* v. *Hayes, supra*, the Court upheld grand jury subpoenas of newspaper reporters in three state courts. And in *Herbert* v. *Lando*, 441 U.S. 153, 60 L.Ed.2d 115 (1979), the Court held that the First Amendment does not preclude a plaintiff's inquiries into the editorial processes leading to publication of an allegedly defamatory television program.

To buttress the constitutional protection for news gathering, the Legislature has amended the Shield Law, N.J. S.A. 2A:84A-21, twice in recent years. Both enactments were in large part responses to judicial construction limiting the effect of the statute.

The bill that ultimately led to the 1977 Shield Law amendments, L. 1977, c. 253, was introduced shortly after the Appellate Division upheld incarceration of a newspaper reporter for his refusal to testify in *In re Bridge*, 120 N.J.Super. 460 (1972),[3] *cert. den.* 410 U.S. 991 (1973). There the court found that by disclosing the name of his source and some information received from the source,

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[3] The legislative history of L. 1977, c. 253 is discussed in *In re Vrazo Subpoena*, 176 N.J.Super. 455, 461-52 (Law Div. 1980).

the reporter had waived his statutory privilege under the waiver provisions of Evid. R. 37, N.J.S.A. 2A:84A-29.[4]

At the time *Bridge* was decided, the statute granting the newsperson's privilege provided as follows:

> Subject to Rule 37, a person engaged on, connected with, or employed by, a newspaper has a privilege to refuse to disclose the source, author, means, agency or person from or through whom any information published in such newspaper was procured, obtained, supplied, furnished or delivered.
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> L. 1960, c. 52, p. 458, §21, eff. July 1, 1960. [footnote omitted.]

The Legislature responded to the finding of waiver in *In re Bridge* by creating separate privileges such that disclosure of information provided by a confidential source did not require the newsperson to identify the source.

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[4] Evidence Rule 37 states:

> A person waives his right or privilege to refuse to disclose or to prevent another from disclosing a specified matter if he or any other person while the holder thereof has (a) contracted with anyone not to claim the right or privilege or, (b) without coercion and with knowledge of his right or privilege, made disclosure of any part of the privileged matter or consented to such a disclosure made by anyone.
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> A disclosure which is itself privileged or otherwise protected by the common law, statutes or rules of court of this State, or by lawful contract, shall not constitute a waiver under this section. The failure of a witness to claim a right or privilege with respect to 1 question shall not operate as a waiver with respect to any other question.
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> L. 1960, c. 52, p. 459, §29, eff. July 1, 1960.

Beyond addressing the waiver issue, however, the Legislature thoroughly revamped the newsperson's privilege to make it more comprehensive. The Legislature revised the privilege to read:

> Subject to Rule 37, a person engaged on, engaged in, connected with, or employed by news media for the purpose of gathering, procuring, transmitting, compiling, editing or disseminating news for the general public or on whose behalf news is so gathered, procured, transmitted, compiled, edited or disseminated has a privilege to refuse to disclose, in any legal or quasi-legal proceeding or before any investigative body, including, but not limited to, any court, grand jury, petit jury, administrative agency, the Legislature or legislative committee, or elsewhere.
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> a. The source, author, means, agency or person from or through whom any information was procured, obtained, supplied, furnished, gathered, transmitted, compiled, edited, disseminated, or delivered; and
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> b. Any news or information obtained in the course of pursuing his professional activities whether or not it is disseminated. . . .
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> L. 1977, c. 253 §1, eff. Oct. 5, 1977; N.J.S.A. 2A:84A-21.

These amendments left no doubt that the Legislature intended to provide comprehensive protection for all aspects of news gathering and dissemination. The Court recognized this intent in *In re Farber*, holding:

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> We read the legislative intent in adopting this statute in its present form as seeking to protect the confidential sources of the press as well as information so obtained by reporters and other news media representatives *to the greatest extent permitted by the Constitution of the United States and that of the State of New Jersey*
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> [78 N.J. at 270 (emphasis added).]

Disclosure of confidential information was ordered in *Farber* only because the newsperson's privilege conflicted with a criminal defendant's constitutional right to compel the attendance of witnesses and production of evidence in his favor.[5]

Following our decision in *Farber*, the Legislature again amended the Shield Law to grant newspersons increased protection in accord with constitutional limits. The new amendments established stringent prerequisites for judicial enforcement of a subpoena issued on behalf of a criminal defendant.[6] Applying the newly amended Shield Law in *State* v. *Boiardo, supra*, the Court vacated an order in a murder trial compelling a reporter to produce for *in camera* inspection a letter written by a prospective government witness. We found that the defendant had not met the statutory requirement of demon-

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[5] U.S. Const., Amend. 6; N.J. Const. (1947), Art. I, par. 10.

[6] These amendments require the party seeking enforcement of the subpoena to prove either that the materials sought are necessary to the defense and not obtainable from any less intrusive source, or by clear and convincing evidence that the privilege has been waived. N.J.S.A. 2A:84A-21.3. The determination must be made before the trial judge orders *in camera* inspection. *Id.*

strating the lack of less intrusive sources of the information contained in the letter. Moreover, we reaffirmed our holding in *Farber* "that the privilege created by N.J.S.A. 2A:84A-21, was intended by the Legislature to be *as broad as possible.*" 82 N.J. at 457 (emphasis added).

Twice in recent sessions, the Legislature has made evident its intent to preserve a far-reaching newsperson's privilege in this State. And twice in recent terms, this Court has construed the Shield Law to protect confidential information to the extent allowed by the United States and New Jersey Constitutions. Absent any countervailing constitutional right, the newsperson's statutory privilege not to disclose confidential information is absolute.

Plaintiff contends that this absolute privilege does not apply to certain news gathering activities that may be characterized as "editiorial processes." These would include communications between newspersons, decisions about which leads to pursue and what information to publish, and the development of a newsperson's belief in the veracity of what he or she pursues and publishes. A reporter's basis for believing in the veracity of what is published has particular importance in an action for defamation by a public figure because, under *New York Times Co.* v. *Sullivan, supra,* a public figure must prove "actual malice"—wilful or reckless disregard of the truth—to recover damages. According to plaintiff, because the Shield Law's enumeration of protected activities does not precisely specify "editorial processes," they are beyond the protection of the statute.

Plaintiff's argument is simplistic. It would deny comprehensive effect to the Shield Law merely because the Legislature did not include those specific words in its exhaustive list of news-gathering activities. It is clear that the Legis-

lature did not intend such a narrow interpretation. The Legislature plainly expressed its intent that all significant news-gathering activities be protected. The Shield Law protects against disclosure of the *"source, author, means, agency or person* from or through whom any information was *procured, obtained, supplied, furnished, gathered, transmitted, compiled, edited, disseminated, or delivered."* N.J.S.A. 2A:84A-21(a) (emphasis added). It also separately protects "any news or information obtained in the course of pursuing . . . professional activities whether or not it is disseminated." N.J.S.A. 2A:84A-21(b). This litany of protected activities was clearly intended to afford complete and pervasive security against disclosure.

Discovery of editorial processes is especially threatening to newspersons because it inhibits the exchange of ideas that is crucial to the functioning of a free and vigorous press. In his dissent in *Herbert* v. *Lando, supra,* Justice Brennan noted the concerns that had impelled the Court of Appeals, 568 F.2d 974, to find an absolute privilege not to disclose editorial proceses as a matter of First Amendment right:

> "[i]deas expressed in conversations, memoranda, handwritten notes and the like, if discoverable, would in the future 'likely' lead to a more muted, less vigorous and creative give-and-take in the editorial room." Chief Judge Kaufman stated that "[a] reporter or editor, aware that his thoughts might have to be justified in a court of law, would often be discouraged and dissuaded from the creative verbal testing, probing, and discussion of hypotheses and alternatives which are the sine qua non of responsible journalism."

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[441 U.S. at 193, 60 L.Ed.2d at 144, quoting *Herbert* v. *Lando*, 568 F.2d at 993-94 (Oakes, J., concurring); *id.* at 980 (Kaufman, C.J.)]

Although the United States Supreme Court reversed the Court of Appeals' decision, nothing in *Herbert* v. *Lando* militates against our interpreting the Shield Law to include the editorial process. The Court there simply held that the First Amendment does not grant a privilege to withhold editorial processes. There was no Shield Law at issue in the case. Moreover, the Court in *Branzburg* v. *Hayes*, 408 U.S. at 706, recognized that its holding does not "bar state courts from responding in their own way and construing their own Constitutions so as to recognize a newsman's privilege, *either qualified or absolute*." (Emphasis added).

We need not determine whether the state constitution grants an absolute evidentiary privilege to newspersons not to disclose editorial processes, for it is clear that the state courts are equally free to enforce a privilege enacted by statute. As was stated in *Boiardo, supra*, "Absent . . . any clear impingement on Sixth Amendment [or other constitutional] rights, the Court's task is simply to determine the legislative intent and to construe the statute accordingly." 82 N.J. at 457. We therefore construe the Shield Law's comprehensive language as applying to the decision-making processes of newspersons.

To summarize, we hold that the New Jersey Shield Law affords newspersons an absolute privilege not to disclose confidential sources and editorial processes, absent any conflicting constitutional right. We must now consider whether assertion of the newsperson's privilege impinges upon any constitutional rights of a plaintiff seeking money damages in a civil suit for defamation.

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III

The law of defamation imposes liability for the publication of false matters injuring the reputation of others. W. Prosser, Law of Torts §111 at 739 (4th ed. 1971). Originally ignored by the common law courts and enforced instead by ecclesiastical tribunals, which regarded the publication as sin, *id.* at 737, defamation has become firmly embedded in all common law jurisdictions. Defamation "embodies the important public policy that individuals and business entities should generally be free to enjoy their reputations unimpaired by false and defamatory attacks." *Rainer's Dairies* v. *Raritan Valley Farms, Inc.*, 19 N.J. 552, 557 (1955). Decisions of this Court, *see, e.g., Rainer's Dairies, supra; Brogan* v. *The Passaic Daily News*, 22 N.J. 139 (1956), and the United States Supreme Court, *see, e.g., New York Times, supra; Herbert* v. *Lando, supra*, recognize the important societal interest in the protection of individual reputations.

However, the existence of a judicial remedy for injury to reputations is entirely a matter of state law. A plaintiff's "interest in reputation is simply one of a number which the State may protect against injury by virtue of its tort law, providing a forum for vindication of those interests by means of damages actions." *Paul* v. *Davis*, 424 U.S. 693, 712, 47 L.Ed.2d 405, 420 (1976).[1]

Following *Paul* v. *Davis*, federal courts have noted that "the State has created the [defamation] cause of action

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[1] The holding in *Paul* v. *Davis* was that an allegation of injury to reputation by a public official acting in the course of his duty, without official approval, failed to state a claim under 42 U.S.C. 1983 or the Fourteenth Amendment. *Paul* v. *Davis* did not affect a prospective plaintiff's right to sue for defamation under state law. It merely held that the right is not constitutionally based.

and hence . . . it can limit, modify or perhaps take it away through the operation of testimonial privileges, absent any claim of constitutional deprivation." *Mazella* v. *Philadelphia Newspapers,* 479 F.Supp. 523, 528 (E.D.N.Y. 1979). In *Steaks Unlimited, Inc.* v. *Deaner,* 623 F.2d 264 (1980), the Third Circuit interpreted the Pennsylvania Shield Law, 42 Pa.Const.Stat.Ann. §5942(a)(Supp. 1979), which is similar to the New Jersey Shield Law, as granting defendants the right not to disclose the unused portions of film taken for an allegedly defamatory television report. The court found that the privilege did not deny due process because there was no constitutional interest in defamation:

> The Constitution has never been construed as requiring the states to provide persons or organizations who have been defamed with a remedy for their injuries. It follows that, to the extent a state chooses to authorize a cause of action for defamation, it may also limit the plaintiff's ability to prove his claim in order to promote other social purposes. (*Id.* at 279 n. 74)

Likewise, this Court has held that although defamation actions serve an important public policy, "in certain situations there is a paramount public interest that persons be permitted to speak or write freely without being restrained by the possibility of an ensuing defamation action." *Rainer's Dairies,* 19 N.J. at 557-58. In many contexts our courts have refused to recognize a cause of action for defamatory statements, including statements made during judicial proceedings, *see Rogers* v. *Thompson,* 89 N.J.L. 639 (E. & A. 1916), before administrative agencies, *see Rainer's Dairies, supra,* and in com-

plaints filed with this Court's Committee on Professional Ethics, *see Friedland* v. *Podhoretz,* 174 N.J.Super. 73 (Law Div. 1980). These limitations on the tort of defamation raise no constitutional issue because

> the State's interest in fashioning its own rules of tort law is paramount to any discernible federal interest, except perhaps an interest in protecting the individual citizen from state action that is wholly arbitrary or irrational.
>
> (*Martinez* v. *California,* 444 U.S. 277, 282, 62 L.Ed.2d 481, 487 (1980))

The Shield Law protection of confidential news sources clearly does not constitute arbitrary or irrational state action.

We respectfully reject Justice Schreiber's argument that the New Jersey Constitution creates a constitutional right to maintain a libel action. Our dissenting colleague relies on Article 1, ¶6 of the Constitution:

> 6. *Liberty of speech and of the press; libel; province of jury.*
>
> Every person may freely speak, write and publish his sentiments on all subjects, *being responsible for the abuse of that right.* No law shall be passed to restrain or abridge the liberty of speech or of the press. In all prosecutions or indictments for libel, the truth may be given in evidence to the jury; and if it shall appear to the jury that the matter charged as libelous is true, and was published with good motives and for justifiable ends, the party shall be acquitted; and the jury shall have the right to determine the law and the fact.
>
> (Emphasis added)

Justice Schreiber would find a constitutional right to sue for libel in the underscored suboordinate clause.

We disagree that the framers intended that clause to have such wide-ranging effect. The entire thrust of Art. 1, ¶6 is protection of speech. The framers, however, did not want that protection to be absolute. Specifically, they did not view the existence of a libel action as inimical to free speech. They therefore inserted a clause to insure that the broad speech protection they were providing would not be construed to preclude libel suits.

This is all that the clause means. We do not believe it was intended to create a right to sue for damages in libel. Had the framers intended such a right, they surely would have expressed that intent more directly. In form and in context, this clause is no more than a caveat to the New Jersey equivalent to the First Amendment.

It would not be wise to construe our Constitution in a way that etches in stone any particular resolution of the difficult conflict between the right of the media to criticize public figures and the right of public figures to have redress for libel. Our holding, premised on our perception of legislative intent, balances those interests differently than the dissent would balance them. But the balance we adopt can always be changed by the Legislature. If we were to adopt the dissent's view, full protection for sources or editorial processes could only be provided by constitutional amendment.

We also reject plaintiff's argument that denying him discovery of material potentially crucial to his claim is a violation of due process. He cites *dictum* in *Brogan* v. *The Passaic Daily News, supra,* that "construction of the [Shield Law] permitting the deprivation of a party's right of cross-examination on vital issues of his cause of

action could create constitutional difficulty or infirmity." 22 N.J. at 154. We agree that any plaintiff whose constitutionally protected interest has been damaged cannot be barred from proving that his rights have been violated. *See Boiardo, supra; Farber, supra.*

Applied to non-constitutional interests, however, plaintiff's argument would work to eliminate all statutory testimonial privileges. We have sustained testimonial privileges, even at the cost of denying a party information possibly vital to his action, "because in the particular area concerned, they are regarded as serving a more important public interest than the need for full disclosure." *State* v. *Briley, supra,* 53 N.J. at 506. In *Cashen* v. *Spann,* 66 N.J. 541, 556 (1975), *cert. den.* 423 U.S. 829 (1975), the Court "emphasize[d] that in civil cases in which disclosure is sought . . . for the purpose of asserting claims for money damages, the interests of the State in maintaining . . . confidentiality . . . are entitled to a greater degree of respect." Federal courts have also noted that plaintiffs in civil actions do not have a compelling interest in obtaining confidential information. *See, e.g., Baker* v. *F. & F. Investment,* 470 F.2d 778, 785 (2d Cir. 1972), *cert.* den., 411 U.S. 966, 36 L.Ed.2d 686 (1973); *Democratic National Committee* v. *McCord,* 356 F.Supp. 1394 (D.D.C. 1973).

In this case, however, we need not evaluate plaintiff's interest in compelling disclosure, other than to affirm that it does not reach constitutional dimensions. The newsperson's privilege contains no limiting language. *Compare* N.J.S.A. 2A:84A-21 *with* N.J.S.A. 2A:84A-28(b) (limiting language found in informer's privilege). The Legislature has already balanced the interests and concluded that the newsperson's privilege shall prevail. Since a plaintiff in a defamation action has no overriding con-

stitutional interest at stake, the newsperson's privilege is absolute in libel cases.[8]

IV

Because the newsperson's privilege asserted by defendants is absolute, plaintiff's motion to compel discovery of sources and editorial processes must fail unless defendants have waived the privilege. Relying on *Brogan* v. *The Passaic Daily News, supra,* plaintiff argues that the defendants have waived their Shield Law protection by partial disclosure and by the assertion of affirmative defenses, including truth, fair comment, good faith, honest belief and lack of malice. We hold that because of changes in the Shield Law and in the constitutional protection of libel defendants since *Brogan,* partial disclosure or the assertion of affirmative defenses no longer constitutes a waiver of the Shield Law privilege. Waiver under the Shield Law operates only as to those specific materials that are knowingly and voluntarily disclosed.

In arguing that defendants have waived their privilege, plaintiff points to the fact that defendant authors revealed that they based their article upon interviews with some 50 lobbyists, administrative officials, legislative liasons, committee aides and Trenton journalists. This disclosure conceivably would have constituted a waiver before the 1977 Shield Law amendments, *see In re Bridge, supra.* The 1977 amendments, however, largely in response to the *Bridge* decision, tightened the requirements for waiver. The Legislature created separate privileges for sources and for information obtained in the course of pursuing

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[8] To the extent that *Brogan* v. *The Passaic Daily News, supra,* differs from this conclusion, it is overruled.

professional activities. N.J.S.A. 2A:84A-21(a), (b). The privileges were intended to apply to every aspect of the news process. *Id.*

While the 1979 Shield Law amendments apply only to discovery requests by criminal defendants, the admendments give a clear indication of the Legislature's intent to narrow the scope of waiver in all proceedings. The 1979 amendments provide that "[p]ublication shall constitute a waiver only as to the specific materials published." N.J.S.A. 2A:84A-21.3(c), L. 1979, c. 479. In criminal proceedings, each piece of confidential information from a source, or about the source, must be separately considered for purposes of finding a waiver of the newsperson's privilege. It is inconceivable that the Legislature intended a broader view of waiver in civil matters, where the public interest in disclosure is less compelling. *See Cashen, supra*, 66 N.J. at 556. We therefore hold that publication[9] of privileged information constitutes a waiver only as to that specific information. The waiver does not operate as to any non-disclosed information.

We recognize that the general provision on waiver, Evid.R. 37, still provides that "disclosure of any part of the privileged matter" constitutes a waiver. L. 1960, c. 52, N.J.S.A. 2A:84A-29. However, the specific waiver provisions in the Shield Law must prevail over the general waiver provision, particularly since the Shield Law

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[9] We are giving "publication" its common usage in the law of libel, meaning communication to someone other than the plaintiff. Prosser, Law of Torts, *supra*, §113 at 766. Black's Law Dictionary (4th ed. 1968). Communication to another newsperson entitled to invoke the privilege, however, would not constitute waiver.

provisions result from a more recent act of the Legislature. *See Brewer* v. *Porch*, 53 N.J. 167, 173 (1969); 2A Sands, Sutherland, *Statutory Construction* (4th ed. 1973). *See also In re Vrazo Subpoena*, 176 N.J.Super. 455 (Law Div. 1980) (disclosure of information does not waive privilege as to identity of source).

The Shield Law would have little force if its thorough protection of confidential information could be so easily waived. Where, as here, defendants have steadfastly refused to divulge their sources and the editorial processes leading to publication of the allegedly libelous article, a finding of waiver must be rejected.

We therefore hold that defendants have not waived their Shield Law privilege. Since that privilege is absolute in the context of a libel action, plaintiff's motion to compel discovery must be denied.

V

We pause here to add a note about the appropriate role of summary judgment in libel cases. Aside from the danger of a libel judgment and the intrusiveness of discovery of sources and editorial process, the cost of defending a libel action can itself deter free press.

The desultory pace of this three-year-old litigation gives little comfort to those who would assert their constitutional right to free speech about public affairs. This is especially true of the many smaller journals and local newspapers which have played an important role in the affairs of New Jersey but which cannot withstand high litigation costs. Our courts should resolve free speech litigation more expeditiously whenever possible.

Appendix B

The perpetuation of meritless actions, with their attendant costs, chills the exercise of press freedom. To avoid this, trial courts should not hesitate to use summary judgment procedures where appropriate to bring such actions to a speedy end. *See Kotlikoff* v. *The Community News*, —— N.J. —— (1982); *Anderson* v. *Stanco Sports Library, Inc.*, 542 F.2d 638, 641 (4 Cir. 1976); *Bon Air Hotel, Inc.* v. *Time, Inc.*, 426 F.2d 858, 864-65 (5 Cir. 1970); *Washington Post Co.* v. *Keogh*, 365 F.2d 965, 968 (D.C. Cir. 1966), *cert.* denied, 385 U.S. 1011 (1967); *Schuster* v. *U.S. News & World Report, Inc.*, 459 F.Supp. 973, 975 (D.Minn. 1978), *aff'd*, 602 F.2d 850 (8 Cir. 1979); *Cardillo* v. *Doubleday & Co.*, 366 F.Supp. 92, 94-95 (S.D. N.Y. 1973), *aff'd*, 518 F.2d 638 (2 Cir. 1975).[10]

Much of this case could have been disposed of by summary judgment. Most of the statements complained of by plaintiff here are obviously opinions, which under *New York Times* v. *Sullivan, supra*, and *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323 (1974), are absolutely privileged.

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[10] In libel actions, summary judgment may be more appropriate on some issues than on others. We have said that trial courts should not hesitate to grant summary judgment for defendant in cases of privileged expressions of opinion. However, summary judgment poses a more difficult problem where the issue is whether a defendant has published a defamatory falsehood with actual malice. As the United States Supreme Court has cautioned, the issue of a defendant's state of mind "does not readily lend itself to summary disposition." *Hutchinson* v. *Proxmire*, 443 U.S. 111, 120 n.9 (1979). As noted, a public figure must prove that the libel was published with actual malice. *New York Times Co.* v. *Sullivan, supra*, 376 U.S. at 279-80. Furthermore, that proof must be "clear and convincing". *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 342 (1974). Courts should carefully examine the circumstances surrounding publication of defamatory allegations of fact to determine whether the issue of actual malice should go to the jury. *See infra*, slip op. at 31-33.

Appendix B

> Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas.
>
> (*Gertz* v. *Welch*, 418 U.S. at 339-40)

See Kotlikoff v. *Communtiy News*, (slip op. at —), —— N.J. at ——.

We need not determine here precisely which statements made in the article are privileged. At least a few statements would survive summary judgment as allegations of fact. Nonetheless, an early paring of plaintiff's claims is appropriate. It would isolate precisely what is at issue, help determine the scope of the discovery needed by the parties and clarify for defendant what it must prove to assert the defense of truth. All of these factors will tend to reduce the costs incurred by defendants here, and by libel defendants as a group, thereby diminishing the threat that libel actions pose to aggressive journalism. The media should not be forced to engage in self-censorship for fear of the expense of defending against frivolous challenges to its editorial judgments. *See New York Times*, 376 U.S. at 279; *Steaks Unlimited, Inc.* v. *Deaner*, 623 F.2d at 280 n.76 (3 Cir. 1980).

The Shield Law privilege may burden some libel plaintiffs who will not survive a summary judgment motion without discovery. It would be unfortunate if some newspersons fabricated malicious lies and then claimed immunity from liability by claiming that they relied in good faith on a confidential source whose identity they decline to reveal. Contrary to states without a Shield Law, in New Jersey a media defendant's refusal to name its source

cannot support an inference that no source existed. *Cf.*, *Downing* v. *Monitor Publishing Co.*, 120 N.H. 383, ——, 415 A.2d 683, 686 (1980) (creating a presumption to that effect in the absence of a statutory privilege). However, similar burdens have attended the entire expansion of constitutional protection for libel defendants, beginning with *New York Times* v. *Sullivan*. This Constitutional protection

> administers an extremely powerful antidote to the inducement to media self-censorship of the common-law rule of strict liability for libel and slander. And it exacts a correspondingly high price from the victims of defamatory falsehood. Plainly many deserving plaintiffs, including some intentionally subjected to injury, will be unable to surmount the barrier of the New York Times test. Despite this substantial abridgement of the state law right to compensation for wrongful hurt to one's reputation, the Court has concluded that the protection of the New York Times privilege should be available....
>
> [*Gertz* v. *Welch*, 418 U.S. at 342-43]

The New Jersey Shield Law does not entirely foreclose any prospective plaintiff's right to maintain a cause of action. An absolute Shield Law privilege gives newspersons less than absolute immunity from suit. In some circumstances, public figures will be able to establish by inferential evidence the recklessness necessary to sustain a libel judgment. When a plaintiff can show that a defamatory report was published, and the author claims reliance solely on confidential sources, the trial court should consider whether the circumstances surrounding the publication warrant submission of the question of actual malice

to the jury. The defendant in such cases, although under no legal duty to reveal its sources, may decide to do so to rebut an inferential showing of actual malice.

"Actual malice" does not mean that the defamatory falsehood was published with ill will, but rather that the statement was made "with knowledge that it was false or with reckless disregard of whether it was false or not." *New York Times Co.* v. *Sullivan, supra,* 376 U.S. at 279-80. Reckless disregard for the truth may appear when a published report

> is based solely on an unverified anonymous telephone call . . . [or] when the publisher's allegations are so inherently improbable that only a reckless man would have put them in circulation. Likewise, recklessness may be found where there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports.
>
> [*St. Amant* v. *Thompson,* 390 U.S. 727, 732 (1968) (footnote omitted)]

A finding of actual malice may not be based solely on the character of the published statement. *Washington Post Co.* v. *Keogh, supra,* 365 F.2d at 970. Nor may it be based solely on the publisher's failure to seek independent verification of the information. *St. Amant* v. *Thompson, supra,* 390 U.S. at 731. The two in combination, however, may support a conclusion of recklessness. Public figure libel plaintiffs can recover for

> a defamatory falsehood whose substance makes substantial danger to reputation apparent, on a showing of highly unreasonable conduct constituting an extreme departure from the standards of investiga-

tion and reporting ordinarily adhered to by responsible publishers.

[*Curtis Publishing Co.* v. *Butts*, 388 U.S. 130, 155, reh. den., 389 U.S. 889 (1967) (holding it reckless to allege that respondent football coach "fixed" a game when defendant publication failed to investigate reports that allegation was false)]

Thus, an inference of actual malice may arise when a false report is published solely in reliance on confidential sources if (1) the content of the report is such as to be defamatory as a matter of law, (2) the defendant knew or should have known of some reasonable means of verifying its accuracy, and (3) the failure to verify rises to the level of a gross violation of the standards of responsible journalism.[11] If the recklessness approaches the level of publishing a knowing, calculated falsehood, the decision whether the defendant acted with reckless disregard for the truth should be submitted to the jury. *See Lawrence* v. *Bauer*, (slip op. at 25-26).

VI

We recognize that our holding may be unfair to certain defamed individuals who cannot meet the difficult burden of proving reckless falsehood without discovery. But the

[11] Contrary to the dissent's assertion, slip op. at 13, failure to verify will often be provable without the necessity of discovery. In some cases, the defendant will indicate who was contacted to verify the claims made. In many other cases, it will be clear from the allegations made from whom verification would likely be sought. Here, for example, plaintiff could show whether defendant contacted the sergeant-at-arms of the Senate or the Legislative Ethics Committee to verify the factual allegations in defendant's article about their actions involving Senator Maressa.

Legislature has determined that the competing interest in a free press outweighs the possibility of damaged reputations. Since defamation is a common law action without a constitutional foundation, the Legislature has the power to limit that action in favor of the right of freedom of press.

Our Constitution grants the press wide freedom because we believe that the public interest is served by an informed citizenry. Those responsible for informing the public can discharge their function best when they can publish without anyone looking over their shoulders. The media must meet stringent deadlines, and it is inevitable that they will occasionally publish an inaccurate statement. The State House is no place for the meek and thin-skinned. Sometimes published statements will hurt. Sometimes they will turn out to be untrue. Nevertheless, those regrettable consequences must yield to the need for an informed citizenry.

When a Legislature protects a free press, it fortifies the foundations of our representative democracy. To permit government to restrain the press is to tempt government to act without restraint. A government that frees the press from restraining influences is a blessing without disguise. It fosters the criticism of official conduct that is necessary to make government responsive to citizens. That is why democracies do not punish inaccurate speech.

Justice Brandeis knew "that freedom to think as you will and to speak as you think are means indispensible to the discovery and spread of political truth; . . . and that the fitting remedy for evil counsels is good ones." *Whitney* v. *California*, 274 U.S. 357, 375, 71 L.Ed. 1095, 1105-06 (Brandeis, J., concurring). The remedy of libel judgments

has a role in our democracy; it compensates individuals for their injured reputations. But only free expression can preserve a democratic nation. Money awards are a medium of financial recompense. But free speech is the national currency. Our legislators have advanced this country's goals by protecting the press even at the cost of reducing their own protection against its attack. Their action would have stirred the former president of this country who said that "were it left to me to decide whether we should have government without newspapers, or newspapers without a govrnment, I should not hesitate a moment to prefer the latter." *The Life and Selected Writings of Thomas Jefferson* 411-12 (A. Koch & W. Peden, eds., 1944).

Every libel law and every law affecting libel actions, including the New Jersey Shield Law, must balance important competing interests. We in no way seek to minimize the individual's interest in protection of his or her good name, which "reflects no more than our basic concept of the essential dignity and worth of every human being," *Rosenblatt* v. *Baer*, 383 U.S. 75, 92, 15 L.Ed.2d 597, 609 (1966) (Stewart, J., concurring). But the Legislature has weighed the competing interests in a free press and the individual interest in reputation. It has chosen to give greater protection to freedom of speech, and our duty is to enforce that choice.[12]

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[12] In fact, it has been forcefully argued that any state law allowing recovery for defamatory falsehood violates the First and Fourteenth Amendments, if applied to speech about official action or public matters. *See New York Times*, 376 U.S. at 293, 295-96 (Black, J., concurring, joined by Douglas, J.) ("the First and Fourteenth Amendments . . . completely prohibit a state from exercising such a power. . . to impose damages for merely dis-

(Footnote continued on following page)

We therefore hold that the Shield Law affords newspersons complete protection against disclosure of their confidential sources and the editorial processes leading to publication of an alleged libel. The order of the Superior Court, Law Division, is reversed, and the matter is remanded for further proceedings consistent with this opinion.

Chief Justice Wilentz and Justices Clifford, Handler, Pollock and O'Hern join in this opinion. Justice Schreiber has filed a separate dissenting opinion.

SCHREIBER, J., dissenting.

Article I, paragraph 6 of the New Jersey Constitution safeguards an individual's right to a cause of action for defamation.[1] It is of course subject to the Federal Consti-

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(Footnote continued from preceding page)

cussing public affairs and criticizing public officials. The power of the United States to do that is, in my judgment, precisely nil."); 376 U.S. at 297 (Goldberg, J., concurring, joined by Douglas, J.) (arguing for absolute privilege to criticize public officials without fear of libel action). The position of these Justices and others finds support in recent reports of an increase in the use of libel actions to intimidate those who criticize public figures. *See, e.g.*, Pell, "Libel as a Political Weapon," The Nation, June 6, 1981.

[1] It is also arguable that the right of an individual to protect his or her good name is secured by the constitutional right of "enjoying and defending . . . liberty, of acquiring, possessing and protecting property, and of pursuing and obtaining safety and happiness." N.J. Const. (1947), Art. I, § I, par. 1. I have chosen to rely on Article I, par. 6 which speaks directly to a cause of action based on defamation.

tution, the Supreme law of the land. As such this right has been abridged to some extent by the United States Supreme Court's interpretation of the First Amendment of the Federal Constitution. Other than that modification the cause of action for defamation cannot be eliminated by the Legislature. Yet the majority's interpretation of the Shield Law, N.J.S.A. 2A:84A-21, has that precise effect in the case of public figures and public officials, despite the lip service it pays to society's interest in assuring that individuals enjoy their reputations unimpaired by false and defamatory attacks. Moreover, the language and sense of that Law do not justify that interpretation. It is for these reasons that I must dissent.

I

A cause of action for defamation was well established in the common law. Reputation was a protectable interest and the courts were available to compensate the injured person for damages attributable to libelous or slanderous statements. See L. Eldredge, *The Law of Defamation* 293-94 (1978). As the press developed and actively participated in public affairs by printing articles and comments about individuals, it naturally became the target of those whose reputations suffered at its hands. Protection of the press became a desired goal by the time the Federal Constitution was adopted. Concern focused on the liberty to print whatever one had a mind to without being subjected to prior restraint. *See* L. Levy, *Freedom of Speech and Press in Early American History* 13-14 (1963). However, accompanying the freedom was a responsibility for disseminating libelous material. Indeed, the generally accepted rule of law was that libelous utterances were not constitutionally protected speech. *Beauharnais* v. *Illinois*,

343 U.S. 250, 266, 72 S. Ct. 725, ——, 96 L.Ed. 919, —— (1952); *Roth* v. *United States,* 354 U.S. 476, 482-83, 77 S.Ct. 1304, ——, 1 L.Ed.2d 1498, —— (1957).

This accommodation between a free press and its responsibility continued substantially unimpaired until *New York Times* v. *Sullivan,* 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964), when the Supreme Court sharply reduced the press's accountability for defamatory statements made about public officials. This standard was later extended to public figures. *Curtis Publishing Co.* v. *Butts,* 388 U.S. 130, 87 S.Ct. 1975, 18 L.Ed.2d (1967). Those plaintiffs had to prove that the press knowingly printed false material or that its publication had been made with a reckless disregard for the truth. The latter element was refined in *St. Amant* v. *Thompson,* 390 U.S. 727, 88 S.Ct. 1323, 20 L.Ed.2d 262 (1968), which held that to show recklessness a plaintiff must introduce evidence "that the defendant in fact entertained serious doubts as to the truth of his publication." *Id.* at 731, 20 L.Ed.2d at 267.

A plaintiff, after the substantive change in libel law effected by *New York Times,* encountered the problem of securing the evidence to meet the new hightened test. Proof of the defendant's state of mind, regarding either actual knowledge or a reckless disregard of the truth, would in all probability have to be developed through the defendant and its employees. Such was the scene in *Herbert* v. *Lando,* 441 U.S. 153, 99 S.Ct. 1635, 60 L.Ed.2d 115 (1979).

In that case, plaintiff, a public figure, sued The Columbia Broadcasting System, Inc. (CBS), Lando, the producer of the CBS television show, and others for portraying him as a liar. Lando refused during the discovery process to answer questions involving his mental processes. These inquiries concerning (1) Lando's conclusions during his

research and investigations about which leads to pursue, (2) his impressions of facts gathered from interviewees and his state of mind about their veracity, (3) the basis of his conclusions where he had reached a determination concerning the veracity of persons, information or events, (4) conversations with the coproducer about what should be included or excluded from the program, and (5) Lando's intentions as manifested by his editorial decisions. *Id.* at 157 n.2, 60 L.Ed.2d at 122 n.2.

The Court of Appeals for the Second Circuit concluded that because Lando's state of mind and editorial conversations were protected by an absolute constitutional privilege he need not respond to a discovery request. The United States Supreme Court reversed. Justice White, writing for a majority, reasoned that damages for defamation did not abridge the freedom of press or free speech when the *New York Times* standard was met. *Id.* at 160, 172, 60 L.Ed.2d at 124, 131. Thus it was proper for a plaintiff to focus discovery on a defendant's thoughts and editorial processes. "[U]nless liability is to be completely foreclosed," the thoughts and editorial processes had to be open to examination. *Id.* at 160, 60 L.Ed.2d at 124.

Moreover, the *Herbert* Court reaffirmed the *New York Times* doctrine which balanced the freedom of the press and the "basic concern" for the individual's interest in his reputation. *Id.* at 169, 60 L.Ed.2d at 129. The Court reiterated that "there [was] no constitutional value in false statements of fact." *Id.* at 171, 60 L.Ed.2d at 131, quoting *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 340, 41 L.Ed.2d 789, ——. Holding those who publish defamatory statements responsible compensates the injured and deters reckless publication of false statements. Thus *Herbert* acknowledges that broad discovery into editorial editing

and processing is permissible under federal discovery rules 26(b)(1) and 26(c) and is not violative of freedom of the press protected by the First Amendment. *Id.* at 177, 60 L.Ed.2d at 134.

Insofar as the First Amendment is concerned, the Supreme Court has recognized that an individual's cause of action for defamation is abridged to the extent that public officials and public figures must prove actual malice as defined in *New York Times.* The Court recognized the importance of the press's freedom, but it rejected "complete immunity from liability from defamation" since that would be "an untenable construction of the First Amendment." *Id.* at 176, 60 L.Ed.2d at 134. Thus it concluded that foreclosing discovery of editorial processing would be going too far at the expense of the individual who had been injured by the defamatory statement. *See* Franklin, "Reflections on *Herbert* v. *Lando,*" 31 *Stanford L.Rev.* 1035 (1979).

II

The Supreme Court acknowledged in *Paul* v. *Davis,* 424 U.S. at 693, 96 S.Ct. 1155, 47 L.Ed. 405 (1976), that there was no federal constitutionally protected right for redress from defamation in the absence of an interest "vouchsafed to him by" a state. *Id.* at —, 47 L.Ed.2d at 420. I find that such an interest exists in New Jersey.

It must be remembered that until the adoption of the Fourteenth Amendment in 1868, there was no federal restriction on state action affecting freedom of the press. The First Amendment to the Federal Constitution applied only to Congress and the authority to legislate on freedom of the press and causes of action for defamation was left to the states. *See* Levy, *Freedom of Speech and*

Press, supra, at 235. Nine of the original states incorporated provisions protecting freedom of the press in their constitutions. Four did not. Even when the state constitutions included protection for the press, it was unquestioned "that the common-law rules that subjected the libeler to responsibility for the private injury, . . . occasioned by his conduct [was] not abolished by the protection extended to the press in [the] constitutions." *Id.* at —.

For example, article sixteen of the Massachusetts Constitution declared that the "liberty of the press is essential to the security of freedom in a State; it ought not therefore to be restrained in this Commonwealth." Yet, Chief Justice Parker declared in *Commnowealth* v. *Blanding,* 20 Mass. 304, —— (1825), that this liberty was subject to a provision in article eleven that "every subject of the Commonwealth ought to find a certain remedy, by having recourse to the laws, for all injuries or wrongs which he may receive in his person, property, or character."

Originally, New Jersey had no constitutional provision regarding freedom of the press. Common law actions for libel or slander were cognizable. *Cf. McCuen* v. *Ludlum,* 17 N.J.L. 12 (Sup. Ct. 1839). The 1844 Constitution contained a bill of rights in Article I, and paragraph 5 of that Article provided:

> Every person may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right. No law shall be passed to restrain or abridge the liberty of speech or of the press. In all prosecutions or indictments for libel, the truth may be given in evidence to the jury; and if it shall appear to the jury that the matter charged as libelous is true, and was published with good motives and for justifiable ends, the party shall be acquitted; and the jury shall have the right to determine the law and the fact.

This language was carried over into our present Constitution. See N.J. Const. (1947), Art. I, par. 6.

The Proceedings of the Constitutional Convention of 1844 reveal that the press paragraph was copied from Article VII, section 8 of the New York Constitution of 1821. 2 *New Jersey Writer's Project* 144 (1942). The constitutional convention proceedings in New York and in New Jersey contain no reference to the first sentence in paragraph 5 relating to a person's right to freely speak, write and publish subject to "being responsible for the abuse of that right."

However, that thought had been expressed similarly by others. Blackstone had stated: "Thus the will of individuals is still left free; the abuse only of that free-will is the object of legal punishment." 4 W. Blackstone, *Commentaries* 154 (4th Cooley ed. J. Andrews 1899). Lord Mansfield in *King* v. *The Dean of St. Asaph,* 3 TR 657, 661 (1784), had written: "The liberty of the press consists in printing without any previous license, subject to the consequence of law." Lord Kenyon in *King* v. *Cuthell,* 27 *Howell St. Tr.* 675 stated "that a man may publish anything which . . . is not blameable, but that he ought to be punished if he publishes that which is blameable." Odgers in his treatise on libel wrote: "Any man is free to speak or to write and publish whatever he chooses of another, subject only to this, that he must take the consequences, should a jury deem his words defamatory. This is what is meant by 'the liberty of the press.'" W. Odgers, *A Digest of the Law of Libel and Slander* 11 (1st Am. ed. Bigelow 1881). Chief Justice Parker in *Commonwealth* explained: "The liberty of the press was to be unrestrained, but he who used it was to be responsible in case of its abuse. . . ." *Commonwealth* v. *Blanding,* 20 Mass. at 311.

Appendix B

Language comparable to the several above quotations was inserted in the New York and New Jersey Constitutions. This terminology acknowledges the press's responsibility for abusing its right to write and publish. The sense of the words is to protect those who would be defamed by irreponsible utterances.

This interpretation of Article I, paragraph 6 has been accepted by those courts which have reflected on it. In *Leers* v. *Green*, 24 N.J. 239 (1956), Justice Heher commented:

> In this [statement in the Constitution] we have the very essence of the freedom of speech and of press secured by the 1947 State Constitution, Article I, paragraph 6, holding the actor "responsible for the abuse of that right," (derived from the 1844 Constitution, Article I, paragraph 5) and also by the First Amendment to the Federal Constitution. [*Id.* at 254]

Sprinkled throughout our reports are other comments reflecting the substantive constitutional protection afforded the individual when the freedom of speaking, writing and publishing has been abused. *See, e.g., State* v. *Boyd*, 86 N.J.L. 75, 79 (Sup. Ct. 1914) ("language tending to the violation of the rights of personal security and private property and toward breaches of the public peace is an abuse of the right of free speech for which by the very constitutional language invoked, the utterer is responsible"); *Coleman* v. *Newark Morning Ledger Co.*, 29 N.J. 357, 379 (1959) (reaffirming language of *Leers*).

The people of New Jersey have carefully guarded the individual's right to damages for libelous statements. The Legislature has not abolished a cause of action for public

figures or officials and I submit that it could not do so since the cause of action is constitutionally protected. The majority interprets the Shield Law, N.J.S.A. 2A:84A-21, to provide that the newsperson's statutory privilege covers the source, the information (whether disseminated or not) and editorial processes. As a result, in most cases a plaintiff's ability to develop evidence relevant to the state of mind of the defendant will have been eliminated and thereby his constitutionally protected cause of action will have been obliterated.

Justice White commented in *Herbert* on the far-reaching effect of precluding a plaintiff from utilizing discovery with respect to editorial processing. He observed that by placing beyond plaintiff's reach a range of direct evidence relevant to providing knowing or reckless falsehood by the publisher of an alleged libel, elements critical to plaintiffs may not be proven. He noted that foreclosing discovery of editorial processes would erect "an impenetrable barrier to the plaintiff's use of such evidence" and "is a matter of some substance, particularly when defendants themselves are prone to assert their good-faith belief in the truth of their publications, and libel plaintiffs are required to prove knowing or reckless falsehood with 'convincing clarity,'" 441 U.S. at 170, 60 L.Ed.2d at 130. The majority asserts that the plaintiff may prove recklessness by showing that the publisher failed to seek independent verification of serious charges. However, the difficulty is that the plaintiff will not be able to prove the necessary ingredients. The reporter need not disclose the source, need not disclose his method of verification, need not disclose the identities of the verifiers, if any, need not explain why he considered the sources responsible, and need not disclose his editorial processing in whole or in part. A reporter,

refusing to divulge any of this information, may comfortably rely on the assertion that his source, albeit only one, was reliable, thereby leading to the termination of the proceeding. *See Edwards* v. *National Audobon Society, Inc.*, 556 F.2d 113, 120 (2d. Cir. 1977). An interpretation of the Shield Law which does what the Supreme Court in *Herbert* refused to do effectively eliminates a public official's or public figure's[2] cause of action for defamation and conflicts with the state constitutional protection given to those individuals who have been wrongly and intolerably damaged by the "abuse of the right" of freedom of the press.

However, this interpretation of the Shield Law is not necessary or warranted. The statute reads as follows:

> Subject to Rule 37, a person engaged on, engaged in, connected with, or employed by news media for the purpose of gathering, procuring, transmitting, compiling, editing or disseminating news for the general public or on whose behalf news is so gathered, procured, transmitted, compiled, edited or disseminated has a privilege to refuse to disclose, in any legal or quasi-legal proceeding or before any investigative body, including, but not limited to, any court, grand jury, petit jury, administrative agency, the Legislature or legislative committee, or elsewhere.
>
> a. The source, author, means, agency or person from or through whom any information was pro-

[2] The broad definition of a "public figure," *Lawrence v. Bauer*, —— N.J. —— (1982), makes the constitutional violation even more egregious.

cured, obtained, supplied, furnished, gathered, transmitted, compiled, edited, disseminated or delivered; and

b. Any news or information obtained in the course of pursuing his professional activities whether or not it is disseminated. [L. 1977, c. 253, §1, eff. Oct. 5, 1977; N.J.S.A. 2A:84A-21]

A careful reading of the statute indicates that the key to subdivision (a) is the identity of the third person who acted as a conduit of the information. The statute focuses on that identification, not on what the defendant newsreporter may do with the information. Subsection (a) does *not* refer to the defendant newspaper person's editorial processes. It does *not* refer to *his* impressions of the facts gathered, *his* conclusions of their veracity, or *his* intentions as manifested by his editorial decisions.

In addition to the fact that the language of the statute does not support the interpretation placed upon it by the majority, the legislative history contains no suggestion that the Legislature intended to foreclose discovery into the defendant's editorial processing. I do not believe the Legislature intended to adopt the "stunning" proposition that the defendant has an absolute privilege to resist the most direct form of inquiry into the precise matter the plaintiff is required to prove with "convincing clarity." *See* Comment, *"Herbert* v. *Lando*: Reporter's Privilege From Revealing the Editorial Process in a Defamation Suit," 78 Colum. L. Rev. 448, 453 (1978). As Justice Brennan in his dissenting opinion in *Herbert* v. *Lando* observed: "It would be anomalous to turn substantive liability on a journalist's subjective attitude and at the same time to shield from disclosure the most direct evidence

of that attitude." 441 U.S. at 192, 60 L.Ed.2d at 144. If there be any guide it is that the Legislature is aware of the principle that evidentiary privileges are not favored, precluding as they do a "rational means for ascertaining truth." *Elkins* v. *United States,* 354 U.S. 206, 234, 80 S.Ct. 1437, ——, 4 L.Ed.2d 1669, —— (1960) (Frankfurter, J., dissenting). *See also United States* v. *Nixon,* 418 U.S. 683, 94 S.Ct. 3090, 41 L.Ed.2d 1039 (1974); 8 Wigmore, Evidence § 2192 (McNaughton rev. 1961).

The majority asserts that occupants of the State House, including members of the state Legislature, should not be "meek and thin-skinned." Yet it is more than the meek and thin-skinned who may refuse public office rather than expose themselves to possible public contempt and ridicule by an irresponsible reporter. Apparently persons within these categories should henceforth disqualify themselves from accepting any public office. Even more devastating is the fact that the *Maressa* doctrine will be applied to ordinary citizens attempting to voice their views in town meetings. *See Lawrence* v. *Bauer,* —— N.J. ——, —— (1982) (Schreiber, J., dissenting).

I would affirm the trial court's order that defendants respond to those interrogatories and depositions addressed to their respective editorial processes.

APPENDIX C

Opinion of the Superior Court of New Jersey, Law Division, dated May 5, 1981

SUPERIOR COURT OF NEW JERSEY

LAW DIVISION—ATLANTIC COUNTY

Docket No. L-43602-79

RESORTS INTERNATIONAL, INC., a corporation organized and existing under the laws of the State of Delaware, et al.,

Plaintiffs,

v.

NJM ASSOCIATES, a New Jersey limited partnership, doing business as the NEW JERSEY MONTHLY, et al.,

Defendants.

Decided: May 5, 1981

Mark D. Schorr for plaintiffs (Sterns, Herbert & Weinroth, attorneys)

Guliet D. Hirsch for defendants (Brener, Wallack, Rosner & Hill, attorneys)

GIBSON, J.S.C.

Appendix C

This is a discovery motion which requires a resolution of the conflict which sometimes arises between the fact-finding role of the litigation process and the privilege in favor of confidentiality for news sources. The facts which bring this issue before the court are not in dispute and may be briefly summarized. Plaintiffs instituted a defamation action as a result of an article which appeared in the May 1979 issue of New Jersey Monthly Magazine entitled "Surrender in Atlantic City." The article concerned itself with the circumstances surrounding the attainment by plaintiff Resorts of a permanent license to operate a casino in Atlantic City. Among other things, the article indicated that Resorts was a "mismanaged, unscrupulous, mob-tainted company . . ." and that as a result of a combination of improper influence and supportive treatment by the Casino Control Commission, bordering on complicity, the license processing was a "sell out." Following the commencement of the suit and as part of the discovery process, plaintiffs served on defendants certain interrogatories and a request for the production of documents. Although many of those interrogatories were answered and certain of the documents were produced, a significant number were not, defendants taking the position that the material was "privileged." Without relating the nature of each and every interrogatory in dispute, the main thrust of the defense position relates to those questions dealing with material obtained through "confidential sources" and those relating to the "editorial process."

Essentially, the issue raised by this motion is whether defendant magazine, being an entity engaged in and connected with the news media, has a privilege to refuse to disclose, as part of this civil proceeding, the sources of its

story and the editorial processes which culminated in its publication. Defendants assert a number of positions in support of the view that the answer to that question should be "no." The privilege that it claims is asserted to be based on the First Amendment of the United States Constitution and the New Jersey Shield Law, N.J.S.A. 2A: 84A-21. Generally, plaintiffs take the position that the First Amendment is not involved and that, although admittedly defendants are included wihtin the protections of the New Jersey Shield Law, that protection has been "waived" in this case because of the defenses asserted, including "good faith," lack of malice, etc.

With respect to the New Jersey Shield Law, the issue raised here was specifically dealt with in the case of *Beecroft* v. *Point Pleasant Print. & Pub. Co.*, 82 N.J. Super. 269 (Law Div. 1964). That case also involved a libel action where the defendant newspaper resisted the plaintiff's efforts at discovery. Relying heavily on the Supreme Court case of *Brogan* v. *The Passaic Daily News*, 22 N.J. 139 (1956), the court held that, although the Shield Law would normally protect the defendant from being compelled to supply the information requested, the pleading of such defense as fair comment, good faith and reasonable belief as to the truth of the subject matter, constituted a waiver of the statutory privilege and accordingly the defendant was required to answer the interrogatories. One of the underlying theories of *Beecroft* and *Brogan* was that the privilege conferred on the news media is permissive and not mandatory, and thus the newspaper, or in this case the magazine, makes a choice as to when it will or will not invoke the privilege. Accordingly, when its own actions bring into question a potential liability on its part to third parties, such as plaintiff here, it should not be able to pick

and choose what it will reveal and what it will not reveal with respect to the information that bears on that liability. *Brogan* v. *The Passaic Daily News, supra* at 152. A contrary conclusion would deprive a plaintiff in a defamation or libel action of the ability to recover punitive damages, since to do so the plaintiff, as a "public figure," must show malice. *Herbert* v. *Lando,* 441 U.S. 153, 60 L.Ed.2 115, 99 S.Ct. 1635 (1979). In order to prove "actual malice" in the constitutional sense a plaintiff in a libel action must show that the defendant proceeded with publication with knowledge that the material was false or with reckless disregard of whether it was false or not. *New York Times* v. *Sullivan,* 376 U.S. 254, 280, 11 L.Ed.2 686, 84 S.Ct. 710 (1964). Therefore, unless a plaintiff can inquire into the bases upon which the defendant proceeded with the publication of the article, including the source of that information, there would presumably be little chance of establishing malice or lack of good faith. The Supreme Court in *Brogan* was not willing to read into the Shield Law an intent by the Legislature to insulate defendants in libel suits from a discovery of the facts which would bear on the issue of malice and punitive damages. *Brogan* v. *The Passaic Daily News, supra,* at 152.

The conclusion that the New Jersey Shield Law is not absolute in its granting of protection to those seeking its application is underscored in the recent case of *In re Myron Farber,* 78 N.J. 259 (1978). Although the legislation was examined there within the context of a criminal trial, the court made clear that when the privileges contained in the statute are confronted by certain competing demands (in that case the constitutional right in favor of compulsory process for obtaining witnesses) the privilege must yield. That case did not involve the issue of "waiver," of course,

but it does refute the proposition that defendant is entitled to any absolute privilege based on the Shield Law.

Defendant urges that the *Brogan* case is distinguishable and that *Beecroft* should not be followed. This court does not find those arguments persuasive. Plaintiff here has admitted that it is a "public figure" for the purposes of this suit and must bear the burden that that classification carries with it. Under the circumstances, the requirement for showing malice is clear. Questions of malice are normally subjective and thus require some examination into the thought process of the person accused. Plaintiff is therefore placed in an impossible position if it cannot pursue through discovery and at the time of trial the nature of that thought process, including the material upon which the article was based. Insofar as defendant relies on confidential sources, plaintiff should be permitted to inquire into the sources and the information actually supplied. Plaintiff should not be compelled to rely on defendant's version of what that information was.

Speaking directly to the question of waiver, the *Beecroft* court made reference to N.J.S.A. 2A:84A-29, a portion of the Shield Law specifically dealing with that subject. Part (b) of the statute indicates that such a waiver exists when the holder of the privilege "without coercion and with knowledge of his right or privilege, made disclosure of any part of the privileged matter or consented to such a disclosure made by anyone." It is not clear from the facts before the court to what extent the published material by defendant here was on the basis of information obtained through confidential sources. Defendants claim that only eight paragraphs of the article fit into that category. Nevertheless, it seems logical to conclude that, since defendant specifically claims to have

relied on a confidential source and since it admits that part of the material printed was the result of information supplied from that source, the above statutory section would justify a conclusion of "waiver." *In re Bridge,* 120 N.J. Super. 460 (App. Div. 1972), *cert.* den. 62 N.J. 80 (1972), *cert.* den. 410 U.S. 991 (1973). The *Beecroft* court did not rely on such a conclusion, however, but rather ruled that the defenses of fair comment, good faith, truth and lack of malice, "while conceivably not within the scope of a waiver as defined by N.J.S.A. 2A: 84A-29(b), can nevertheless be viewed as an act constituting an effective waiver . . ." *Beecroft* v. *Point Pleasant Print. & Pub. Co., supra* at 279. In so concluding, the court reasoned that, although the Legislature set forth only two instances of statutory waiver, waiver could also occur just as effectively from the other acts. *Ibid.; see also* Evid.R. 37 (Anno. 1980), comment at 182.

In addition to the New Jersey Shield Law, defendants claim that they are protected from disclosure under the First Amendment to the United States Constitution. Cited in support of that proposition is the case of *Branzburg* v. *Hayes,* 408 U.S. 665, 33 L.Ed.2d 626, 92 S.Ct. 2646 (1972). Consistent with that position, defendants also argue that there is a federal common-law privilege against disclosure for reporters and that a balance must be drawn between that privilege and the interest of private criminal or civil litigants seeking the information. There are certain federal cases which support this view. *See Garland* v. *Torre,* 259 F.2d 545 (2 Cir. 1958); *Riley* v. *City of Chester,* 612 F.2d 708 (3 Cir. 1979); *Bruno & Stillman* v. *Globe Newspaper,* 633 F.2d 583 (1 Cir. 1980). Such courts urge that prior to ordering the disclosure of confidential sources the trial judge, among other things, must be satisfied that the applicant has established the relevance of the

desired information, and also that the plaintiff has made an independent attempt to secure the information through less intrusive sources and has been unsuccessful. *See Senear* v. *Daily Journal American*, 27 Wash. App. 454, 618 P.2d 536 (App.Ct. 1980), for a general review of the law in this area.

Perhaps the simplest answer to this particular defense is that once there had been a determination of "waiver," as there has been in this case, it probably makes little difference whether one relies on the Shield Law or the First Amendment for establishing the *existence* of the privilege. Whatever the source of the privilege, it has been waived. No balancing or weighing is required in order to determine whether or not the privilege should yield. None of the federal cases cited by counsel and none that was discovered through the court's own research speak to the issue of waiver. It is thus difficult to accept the thrust of the First Amendment argument. The *Branzburg* case, which was a 5-4 decision by the United States Supreme Court, specifically held that there was no First Amendment right in favor of privilege against revealing confidential sources by a newsman in a grand jury setting. Our own Supreme Court in the case of *In re Myron Farber, supra,* reiterated that holding. *Id.* at 266-267. In so ruling our court specifically noted that in reaching its conclusion it did "no weighing or balancing of societal interests." *Id.* at 268. Although the *Farber* decision, as stated, arose in the criminal, as opposed to the civil context, the existence or nonexistence of a constitutional privilege should not depend on the form of the judicial proceeding wherein it is raised. The First Amendment defense is therefore rejected.

Of further significance in assessing this phase of defedants' position is that the New Jersey Shield Law was

amended in certain respects following the *Farber* decision. L. 1979, c. 479, §1 *et seq.* (eff. Feb. 27, 1980). In essence, the amended sections deal with procedures applicable when there is a claim and exercise of a newspaper person's privilege in a setting where the newspaper person is responding to a subpoena issued by or on behalf of a defendant in a criminal proceeding. N.J.S.A. 2A: 84A-21.1 *et seq.* After a prima facie showing that the person asserting the privilege is engaged in or connected with the news media, etc., N.J.S.A. 2A:84A-21.3 requires the defendant to show by clear and convincing evidence that the privilege has been waived under N.J.S.A. 2A: 84A-29 (R. 37) or that by a preponderance of the evidence

> . . . there is a reasonable probability that the subpenaed materials are relevant, material and necessary to the defense, that they could not be secured from any less intrusive source, that the value of the material sought as it bears upon the issues of guilt or innocence outweighs the privilege against disclosure, and that the request is not overbroad, oppressive, or unreasonably burdensome which may be overcome by evidence that all or part of the information sought is irrelevant, immaterial, unnecessary to the defense, or that it can be secured from another source. Publication shall constitute a waiver only as to the specific materials published.

The above provisions sound very much like the position being asserted by the defense in this case under the label of the First Amendment or federal common-law privilege against nondisclosure. The significance of the legislation to the case at bar, however, is that it appears to

relate exclusively to cases involving defendants in a criminal proceeding. Indeed, this is presumably the view of defendants here, since the statute was not cited to the court in any of the many briefs and memorandums submitted in defense of this motion. It seems apparent that the New Jersey Legislature was responding specifically to the issues raised in the case of *In re Myron Farber.* The fact that the Legislature chose not to change the procedures applicable in civil settings is significant. Under normal statutory construction the Legislature is presumed to know of the outstanding case law interpreting a particular statute, such as *Brogan* and *Beecroft,* and yet it took no steps to change the language in a way which would reject that interpretation. *Beecroft* v. *Point Pleasant Print. & Pub. Co., supra* at 276; *State* v. *Burns,* 159 N.J. Super. 539, 545 (App. Div. 1978). *See also* Legislative Comment to Assembly Bill No. 3062—L.1979, c.479. Nor does a broad reading of the amendments to the Shield Law which would apply the new procedures to a civil setting seem to be a fair interpretation. This is particularly true in view of the "universal recognition" that statutory privileges, being in derogation of the common-law right to obtain information on matters directly in issue, should be strictly construed. *Beecroft* v. *Point Pleasant Print. & Pub. Co., supra* at 276; *Brogan, supra.*

It is the opinion of the court, therefore, that neither the New Jersey Shield Law nor the First Amendment to the federal constitution may be utilized by defendants in this case to successfully resist plaintiffs' application for discovery. Although the Shield Law clearly applies, there has been a waiver both under R.37 of the Rules of Evidence and under the general waiver created by the assertion of the defenses of lack of malice and good faith.

Appendix C

There are two other defenses which have been asserted, however, which require the attention of this court. First, defendants suggest that, since only eight of the paragraphs of its article rely on confidential sources and since those paragraphs do not contain defamatory material insofar as plaintiff is concerned, disclosure is not required. Second, it is argued that the editorial process is protected, even if confidential sources are not. Neither argument is persuasive to this court. The particular paragraphs now claimed by defendants to be the result of material obtained through confidential sources cannot be read in isolation, but rather must be considered as part of the entire context of the article, where clearly there is more than enough to establish a prima facie case of libel. Also, although the paragraphs identified by defendants arguably do not *directly* libel Resorts, they are inextricably entwined in a setting that, at least by implication, ties Resorts to "mob" money and the utilization of improper influence. (The specific paragraphs in question are outlined on p. 18 of defendants' initial brief.)

With respect to the "editorial process," defendants argue that the New Jersey Shield Law specifically relates to written and oral information which has been edited by the news media. Although the Supreme Court of the United States specifically rejected this argument within the context of a claim of privilege under the First Amendment, *Herbert* v. *Lando, supra,* defendants urge that the Shield Law nevertheless protects them and that *Herbert* v. *Lando* too narrowly construed the "editorial *process.*" Although this court rejects the "narrow construction" interpretation of *Herbert* v. *Lando,* it is the fundamental thrust of this opinion that the matter is

controlled not by the First Amendment, but rather by our own Shield Law and, as already indicated, defendants' claims of good faith and lack of malice effectively waived its privilege of nondisclosure. That waiver relates not only to confidential sources, but to the editorial process as well. In fact, the concept of waiver seems even more compelling when one deals with the editorial process than it does in the case of confidential sources, at least with respect to the issue of malice. Such comparison, however, is academic in view of the positions taken by this court.

In summary, it is the opinion of this court that based on the facts here plaintiff is entitled to inquire into sources of the alleged libelous article, including those identified as being confidential. That inquiry may include the "editorial process" and is not precluded by the First Amendment to the federal constitution. Although defendants are entitled to the protection of the New Jersey Shield Law, that protection has been waived. Plaintiff may submit an order consistent with the above.

APPENDIX D

Amended Opinion of the Superior Court of New Jersey, Law Division, dated July 1, 1981

SUPERIOR COURT OF NEW JERSEY

LAW DIVISION—ATLANTIC COUNTY

Docket No. L-43602-79

RESORTS INTERNATIONAL, INC., a corporation organized and existing under the laws of the State of Delaware, *et al.*,

Plaintiffs,

v.

NJM ASSOCIATES, a New Jersey limited partnership, doing business as the NEW JERSEY MONTHLY, *et al.*,

Defendants.

Decided: July 1, 1981.

Mark D. Schorr for plaintiffs (Sterns, Herbert & Weinroth, attorneys)

Guliet D. Hirsch for defendants (Brener, Wallack, Rosner & Hill, attorneys)

GIBSON, J.S.C.

Appendix D

This is a discovery motion which requires a resolution of the conflict which sometimes arises between the fact-finding role of the litigation process and the privilege in favor of confidentiality for news sources. The facts which bring this issue before the court are not in dispute and may be briefly summarized. Plaintiffs instituted a defamation action as a result of an article which appeared in May 1979 issue of New Jersey Monthly Magazine entitled "Surrender in Atlantic City." The article concerned itself with the circumstances surrounding the attainment by plaintiff Resorts of a permanent license to operate a casino in Atlantic City. Among other things, the article indicated that Resorts was a "mismanaged, unscrupulous, mob-tainted company . . ." and that as a result of a combination of improper influence and supportive treatment by the Casino Control Commission, bordering on complicity, the license processing was a "sell out." Following the commencement of the suit and as part of the discovery process, plaintiffs served on defendants certain interrogatories and a request for the production of documents. Although many of those interrogatories were answered and certain of the documents were produced, a significant number were not—defendants taking the position that the material was "privileged." Without relating the nature of each and every interrogatory in dispute, the main thrust of the defense position relates to those questions, dealing with material obtained through "confidential sources" and those relating to the "editorial process."

Essentially, the issue raised by this motion is whether defendant magazine, being an entity engaged in and connected with the news media, has a privilege to refuse to disclose as part of this civil proceeding, the sources of its

story and the editorial process which culminated in its publication. Defendants assert a number of positions in support of the view that the answer to that question should be "no." The privilege that it claims is asserted to be based on the First Amendment of the United States Constitution and the New Jersey Shield Law, N.J.S.A. 2A: 84A-21. Generally, plaintiffs take the position that the First Amendment is not involved and that, although admittedly defendants are included within the protections of the New Jersey Shield Law, that protection has been "waived" in this case because of the defenses asserted, including "good faith," lack of malice, etc.

With respect to the New Jersey Shield Law, the issue raised here was specifically dealt with in the case of *Beecroft* v. *Point Pleasant Print. & Pub. Co.*, 82 N.J. Super. 269 (Law Div. 1964). That case also involved a libel action where the defendant newspaper resisted the plaintiff's efforts at discovery. Relying heavily on the Supreme Court case of *Brogan* v. *The Passaic Daily News*, 22 N.J. 139 (1956), the court held that, although the Shield Law would normally protect the defendant from being compelled to supply the information requested, the pleading of such defenses as fair comment, good faith and reasonable belief as to the truth of the subject matter constituted a waiver of the statutory privilege and accordingly the defendant was required to answer the interrogatories. One of the underlying theories of *Beecroft* and *Brogan* was that the privilege conferred on the news media is permissive and not mandatory, and thus the newspaper, or in this case the magazine, makes a choice as to when it will or will not invoke the privilege. Accordingly, when its own actions bring into question potential liability on its part to third parties, such as plaintiff here, it should not be able

to pick and choose what it will reveal and what it will not reveal with respect to the information that bears on that liability. *Brogan* v. *The Passaic Daily News, supra* at 152. It was noted in *Brogan* that to permit a defendant in a libel case to insulate itself from an inquiry into the sources of its publication could effectively deprive the plaintiff of the ability to prove malice. Absent such a showing, a recovery of punitive damages would be foreclosed. The Court was unwilling to read such an intent into the Shield Law. *Ibid.*

Brogan, of course, was decided eight years prior to the landmark case of *New York Times* v. *Sullivan,* 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964). Under the present state of the law a "public figure" must prove malice not only to recover *punitive* damages, but to recover *at all.* To establish "actual malice" in the constitutional sense requires a showing that the defendant proceeded with publication with knowledge that the material was false or with reckless disregard of whether it was false or not. *Ibid.* The rationale of *Brogan* is therefore more compelling today than it was then. At stake today is not merely the establishment of facts sufficient to establish a basis for punitive damages, but rather the survival of the cause of action itself. *Cf. Carey* v. *Hume,* 429 F.2d 631, 634 (Dist. Ct. D.C. 1974).

The conclusion that the New Jersey Shield Law is not absolute in its granting of protection to those seeking its application was underscored in the case of *In re Myron Farber,* 78 N.J. 259 (1978). Although the Shield Law was examined there within the context of a criminal trial, the Court made clear that when the privileges contained in the statute are confronted by certain competing demands (in that case the constitutional right in favor of compulsory

process for obtaining witnesses) the privilege must yield. That case did not involve the issue of "waiver," but it does refute the proposition that defendant is entitled to any absolute privilege based on the Shield Law. *See also State* v. *Boiardo*, 82 N.J. 446 (1980).

Defendant urges that *Brogan* and *Beecroft* are no longer good law and should not be followed. However, absent some clear rejection of *Brogan* by a later tribunal of equal or higher authority, this court is not free to reject its ruling. Nor is such a suggestion persuasive on the merits. Plaintiff here has admitted that it is a "public figure" for the purposes of this suit and must bear the burden that that classification carries with it. Under the circumstances, the requirement for showing malice is clear. Questions of malice are normally subjective and thus require some examination into the thought process of the person accused. Plaintiff is therefore placed in an impossible position if it cannot pursue through discovery and at the time of trial the nature of that thought process, including the material upon which the article was based. Insofar as defendant relies on confidential sources, there should be an opportunity to inquire into the sources and the information actually supplied. Plaintiff should not be required to rely on defendant's version of the information which is critical to the establishment of the cause of action.

In addition to the general propositions previously related, the courts in both *Brogan* and *Beecroft* supported their rulings in favor of disclosure based on the conclusion that the defendants had "waived" the privilege afforded to them under the Shield Law. As noted,

> The privilege given, like any other personal privileges, constitutional or statutory, can be waived by

> voluntary testimony of the person upon whom the privilege is conferred. [citations omitted] [*Brogan* v. *The Passaic Daily News, supra* at 152]

The defendant in *Brogan* took the stand and, after testifying that he obtained his information from a "reliable source," related the substance of the information he received. The Court held that in view of the defenses asserted (good faith, truth and lack of malice) such conduct constituted a "waiver" and therefore an inquiry into the privileged information should have been permitted. In *Beecroft,* as here, the issue came before the court as part of the discovery process. The same defenses of good faith, lack of malice, etc., were asserted, and the defendant again claimed that the information relied upon for the article was based on confidential sources. In ordering disclosure, the court made reference to N.J.S.A. 2A:84A-29, a section of the Shield Law speaking directly to waiver. Part (b) of that statute indicates that waiver exists when the holder of the privilege "without coercion and with knowledge of his right or privilege, made disclosure of any part of the privileged matter or consented to such a disclosure made by anyone." *Beecroft* did not rely on this provision, however, but rather ruled that the asserting of the defenses listed above, "while conceivably not within the scope of a waiver as defined by N.J.S.A. 2A:84A-29(b), can nevertheless be viewed as an act constituting an effective waiver . . ." *Beecroft* v. *Point Pleasant, Print. & Pub. Co., supra* at 279. In so concluding, the court reasoned that, although the Legislation set forth only two instances of statutory waiver, waiver could also occur just as effectively from other acts. *Ibid.; see also* Evid.R.37 (Anno. 1980), comment at 182. *Cf. In re Bridge,* 120 N.J. Super. 460 (App. Div. 1972), *cert.* den. 62 N.J. 80 (1972), *cert.* den. 410 U.S. 991 (1973).

Appendix D

Although neither *Beecroft* nor *Brogan* so ruled, one could argue that, since defendant has identified portions of the article as being based on confidential sources and has given "testimony" to this effect by certifying answers to interrogatories to be true, a statutory waiver has occurred. N.J.S.A. 2A:8A-29. Such a reading would probably mean that every defendant in a libel suit who claims to have relied on confidential sources would waive the protections of the Shield Law. No case appears to have gone that far; nor need this court do so. The rationale of *Brogan* and *Beecroft* provides ample authority for a finding of waiver here. The fact that the issue is being examined at the discovery stage as opposed to a trial setting does not alter the controlling principles. *See Herbert* v. *Lando,* 441 U.S. 153, 60 L.Ed.2d 115, 99 S.Ct. 1635 (1979).

Further support for the conclusion that defendants are required to disclose their sources in this setting may be found in the recent amendments to the New Jersey Shield Law, L. 1979, c. 479, §1 *et seq.* (eff. Feb. 27, 1980). In an apparent response to the *Farber* decision, the amended sections deal with procedures applicable when there is a claim and exercise of a newspaper person's privilege where the claimant is responding to a subpoena issued by or on behalf of a defendant in a criminal proceeding. N.J.S.A. 2A:84A-21.1 *et seq.* After a *prima facie* showing that the person asserting the privilege is engaged in or connected with the news media, etc., the statute requires the defendant to show by clear and convincing evidence that the privilege has been waived under N.J.S.A. 2A:84A-229 (R. 37) or that by a preponderance of the evidence

> . . . there is a reasonable probability that the subpoenaed materials are relevant, material and neces-

> sary to the defense, that they could not be secured from any less intrusive sources, that the value of the material sought as it bears upon the issue of guilt or innocence outweighs the privilege against disclosure, and that the request is not overbroad, oppressive, or unreasonably burdensome which may be overcome by evidence that all or part of the information sought is irrelevant, immaterial, unnecessary to the defense, or that it can be secured from another source. Publication shall constitute a waiver only as to the specific materials published. [N.J.S.A. 2A: 84A-21.3]

The above provisions are very similar to those required by the various federal cases recognizing a privilege under the First Amendment label. *See* discussion *infra*. The significance of the legislation at this point, however, is that it appears to relate exclusively to cases involving defendants in a criminal proceeding. Indeed, defendants do not suggest otherwise. The fact that the Legislature has recently reexamined this area and has chosen not to change the procedures applicable in civil settings is significant. Under normal statutory construction the Legislature is presumed to know of the outstanding case law interpreting a particular statute. Having taken no steps to change the legislation in a way which would reject the readings given to it by *Brogan* and *Beecroft*, this court must assume that the Legislature intended to keep them intact. *Beecroft* v. *Point Pleasant Print. & Pub. Co., supra* at 276; *State* v. *Burns*, 159 N.J. Super. 539, 545 (App. Div. 1978); *see also* Legislative Comment to Assembly Bill No. 3062—L. 1979, c. 479. Nor does a broad reading of the amendments which would apply the new procedures to a civil setting seem to be a fair interpretation. This is par-

ticularly true in view of the "universal recognition" that statutory privileges, being in derogation of the common-law right to obtain information on matters directly in issue, should be strictly construed. *Beecroft* v. *Point Pleasant Print. & Pub. Co., supra* at 276; *Brogan, supra.*

The New Jersey Shield Law aside, defendants argue that they are protected from disclosure under the First Amendment to the United States Constitution. Cited in support of that proposition is the case of *Branzburg* v. *Hayes,* 408 U.S. 665, 33 L.Ed.2d 626, 92 S.Ct. 2646 (1972), and a number of federal court decisions, including some from the Third Circuit. *See Riley* v. *City of Chester,* 612 F.2d 708 (3 Cir. 1979); *United States* v. *Cuthbertson,* 630 F.2d 139 (1980); *United States* v. *Criden,* 633 F.2d 346 (3 Cir. 1980). The thrust of most of the federal rulings indicates that a reporter has a First Amendment privilege which protects the identity of confidential sources, but that privilege is not absolute and must yield when outweighed by competing demands. *Miller* v. *Transamerican Press, Inc.,* 621 F.2d 721, 725 (5 Cir. 1980). Each case therefore requires a balancing of those demands within the factual framework presented. In a civil setting the competing interests include, on the one hand, the policy in favor of allowing the press unfettered access to sources of information and, on the other, the fundamental goal of the judicial system in having unimpaired access to the testimony and relevant information which is essential to a search for the truth. *Cervantes* v. *Time, Inc.,* 464 F.2d 986 (8 Cir. 1972), *cert.* den. 409 U.S. 1125 (1973). Defendants thus argue that the constitutional dimensions of the privilege require that this court deny the request for disclosure absent a finding (1) that the material sought is relevant; (2) that it

"goes to the heart" of the case, and (3) that it cannot be obtained through less intrusive sources. *See Garland* v. *Torres*, 259 F.2d 545 (2 Cir. 1958).

Plaintiffs assert that no such First Amendment freedom exists, that the issue is evidential in nature and is thus controlled by our own rules and statutes. Perhaps the simplest answer to this question is that once there has been a determination of "waiver," as there has been in this case, it makes little difference whether one relies on the Shield Law or the First Amendment for establishing the existence of the privilege. Whatever the source of the privilege, it has been waived. *Cf. Anderson* v. *Nixon*, 444 F.Supp. 1195, 1199 (Dist. Ct. D.C. 1978), recognizing the First Amendment privilege but ordering disclosure on the theory of waiver where the reporter was the plaintiff.

To deal with this issue on a substantive level requires a resolution of conflicting signals, not only from the federal sources themselves, but as between the state and federal decisions. For example, although the *Branzburg* decision is repeatedly cited as the source of the conclusion that the First Amendment provides a qualified privilege for newspersons sources, such a conclusion cannot be attributed to the majority of the Court. The ruling was a 5-4 decision, or perhaps more accurately 4-1-4, Justice Powell's concurring opinion being needed to obtain a majority. The plurality specifically rejected the notion that a First Amendment privilege existed for newsmen which would justify their refusal to testify before a grand jury. Although Powell's concurring opinion spoke in terms of balancing "vital constitutional and societal interests on a case-by-case basis . . .," no such balancing was done by the plurality and our own Supreme Court

rejected such a weighing process when faced with the same claim. *In re Myron Farber, supra* at 268. In so holding, it similarly rejected the claim that a First Amendment privilege existed in such a setting. *Ibid.* Most federal court decisions read *Branzburg* more broadly. *See e.g. Riley* v. *City of Chester, supra; United States* v. *Cuthbertson, supra.*

The most recent pronouncement from the New Jersey Supreme Court also lends support to a broader reading. *State* v. *Boiardo, supra* at 455. The issue came before the Court in *Boiardo* as a result of a claim of privilege by a reporter subpoenaed to testify in a criminal trial. Speaking to the conflict between the rights to a fair trial and free press, the Court noted that when faced with this conflict the court must consider, "under the precise facts . . ., whether and in what manner a reconciliation of competing interests may be accomplished that will cause minimum interference with the rights of the parties." *Ibid.* Although the Court relied on the recently amended Shield Law to support its conclusion, N.J.S.A. 2A:84A-21.1 *et seq.*, it also gave recognition to the "constitutional dimension" of the problem. *Id.* at 456-457, f.n. 8. *See also State* v. *Boiardo*, 83 N.J. 350 (1980).

In assessing the above authorities, it is important to keep in mind the precise factual settings within which the rulings were made. *Branzburg, Cuthbertson* and *Boiardo,* for example, all involved criminal proceedings where the reporter claiming the privilege was not a party. Although the existence or nonexistence of a constitutional privilege should not depend on the nature of the judicial proceedings where it is asserted, *United States* v. *Cuthbertson, supra* at 147, the status of the reporter does have an impact on the weighing process. Where it is the re-

porter's own actions which are in issue, as is the case in a libel action, not only is the legitimacy of the asserted privilege called into question but, as previously pointed out, the ability of the plaintiff to inquire into the nature of the source material becomes critical. *See Herbert* v. *Lando, supra; Miller* v. *Transamerican Press, Inc., supra; Carey* v. *Hume, supra.*

Having said that, however, does not mean that in every libel case discovery into confidential sources should routinely be granted. As a threshold matter, there should be an inquiry into the substance of the libel allegations. *Cervantes* v. *Time, Inc.*, 464 F.2d 986, 993 (8 Cir. 1972), *cert. den.* 409 U.S. 1125 (1973). Satisfaction of the three-part test outlined in *Garland, supra,* would provide the further insulating process necessary to accommodate the competing demands that these cases present; *i.e.,* (1) is the information relevant; (2) is there a compelling interest in the information, and (3) can it be obtained by alternative means? *Miller* v. *Transamerican Press, Inc., supra* at 726.

Assuming the existence of a constitutional dimension to the privilege and the applicability of the above three-part test, the circumstances of this case nevertheless justify disclosure. The thrust of the magazine article here charges plaintiff with being mismanaged, unscrupulous and "mob-tainted." It cannot be suggested, therefore, that the libel allegations are without substance. As to the requirement for relevance, clearly the basis upon which such charges are founded qualifies. Plaintiff has similarly shown a compelling need for the information in view of the critical bearing of such information on the question of malice. *New York Times* v. *Sullivan, supra.* As to the requirement that less intrusive sources be exhausted, it

is difficult to conceive in this setting how such a search could be accomplished. The mob-connection charge goes to the heart of the libel claim. To the extent that defendants rely on confidential sources for such a conclusion, it would seem that there is no other practical way to inquire into the bona fides of such a claim. Certainly this court can take judicial notice that the "mob" is not easily identified and does not make its members readily available to examination.

It is the opinion of this court, therefore, that, whether one relies on the New Jersey Shield Law or the First Amendment to the Federal Constitution, under the facts of this case defendants may not successfully resist plaintiffs' application for discovery. The protections of the Shield Law, although clearly applicable, have been waived. Assuming that the protection is constitutional in its dimension, it nevertheless must yield under the circumstances presented here.

There are two other defenses which have been asserted which still require the attention of this court. First, defendants now suggest that, since only eight of the paragraphs of its article rely on confidential sources and since those paragraphs do not contain defamatory material insofar as plaintiff is concerned, disclosure is not required. Second, it is argued that the editorial process is protected, even if confidential sources are not. Neither argument is persuasive. The particular paragraphs now claimed by defendants to be the result of material obtained through confidential sources cannot be read in isolation, but rather must be considered as part of the entire context of the article, where clearly there is more than enough to establish a *prima facie* case of libel. Also, although the paragraphs identified by defendants arguably do not *directly* libel Re-

sorts, they are inextricably entwined in a setting that, at least by implication, ties Resorts to "mob" money and the utilization of improper influence. (The specific paragraphs in question are outlined on p. 18 of defendants' initial brief.)

With respect to the "editorial process," defendants again argue that both the New Jersey Shield Law and the First Amendment insulate an inquiry into this area. The Supreme Court of the United States specifically rejected this argument within the context of a claim of privilege under the First Amendment, *Herbert* v. *Lando, supra.* Defendants argue, however, that *Herbert* v. *Lando* too narrowly construed the "editorial process" and that the Shield Law protects them in any event. This court rejects the "narrow construction" interpretation of *Herbert* v. *Lando.* However, even assuming that the Supreme Court was too narrow in its views, its opinion is nevertheless controlling here. As to the Shield Law, the prior conclusions concerning waiver apply just as effectively whether one deals with the disclosure of confidential sources or the editorial process. Both bear critically on the establishment of facts needed by plaintiffs to establish defendants' malice and lack of good faith. In fact, the concept of waiver seems even more compelling when one deals with the editorial process than it does in the case of confidential sources. Such a comparison, however, is academic in view of the positions taken by this court.

In summary, it is the opinion of this court that based on the facts here plaintiff is entitled to inquire into the sources of the alleged libelous article, including those identified as being confidential. That inquiry may also include the "editorial process." Whatever First Amendment protections exist are outweighed by the fundamental need for

unimpaired access to the information which is critical to the within cause of action and to the search for the truth. Although defendants are entitled to the protection of the New Jersey Shield Law, that protection has been waived.

Plaintiff may submit an order consistent with the above.

APPENDIX E

Order of the Superior Court of New Jersey, Law Division, dated July 7, 1981

SUPERIOR COURT OF NEW JERSEY

LAW DIVISION—ATLANTIC COUNTY

Docket No. L-43602-79

RESORTS INTERNATIONAL, INC., a corporation organized and existing under the laws of the State of Delaware, et al.,

Plaintiffs,

v.

NJM ASSOCIATES, a New Jersey limited partnership, doing business as the NEW JERSEY MONTHLY, et al.,

Defendants.

This matter having been opened to the Court by Sterns, Herbert & Weinroth, P.A., attorneys for plaintiffs (Mark D. Schorr, appearing) on an application for an Order compelling defendants to provide full and responsive answers, pursuant to R. 4:17-5(a), to the Interrogatories served on them by plaintiffs and for an Order compelling inspection of documents, pursuant to R. 4:18-1(b), in the presence of Brener, Wallack, Rosner & Hill, attorneys for defendants (Guliet D. Hirsch, appearing), and the Court having heard

the arguments of counsel and having considered the moving and answering pleadings and the briefs submitted on behalf of the parties, and the Court having issued its formal written Opinion, which Opinion is dated May 5, 1981 and which is incorporated herein by reference, and the Court having ruled that defendants have waived any privilege they might assert as to the confidentiality of the sources and editorial processes involved in the publication of the article alleged to be libelous in this action, and good cause appearing for the entry of this Order;

It is ORDERED on this 7 day of July, 1981 that:

1. Defendant shall, within thirty (30) days of the entry of this Order, answer the following Interrogatories contained in the First Set and served on defendant NJM Associates and NJM Publishing Co., their employees and agents: Nos. 11(c), 11(d), 11(h), 11(k), 11(l), 14, 15, 20, 22, 44 through 47, 62, 63, 70, 71, 73 and 74;

2. Defendant shall, within thirty (30) days of the entry of this Order, answer the following Interrogatories contained in the First Set and served on defendant Dorman: Nos. 32 through 34, 36 through 38, 42(c), 42(h), 42(l), 43 through 50, 58 through 61, 71, 72, 79 and 80;

3. Defendant shall, within thirty (30) days of the entry of this Order, produce for inspection and copying the documents in the following specifications contained in the Request for Production of Documents served on defendant NJM Associates and NJM Publishing Co., their employees and agents: Nos. 1 through 4, 6 through 8 and 12; and

4. Defendant shall, within thirty (30) days of the entry of this Order, produce for inspection and copying the documents in the following specifications contained in the Request for Production of Documents served on defendant Dorman: Nos. 1 through 4, 6 through 9, 13.

s/ L. ANTHONY GIBSON, J.S.C.

APPENDIX F

New Jersey Statutes Annotated 5:12-1 *et seq.*
(New Jersey Casino Control Act)

5:12-80. General provisions

a. It shall be the affirmative responsibility of each applicant and licensee to establish by clear and convincing evidence his individual qualifications, and for a casino license the qualifications of each person who is required to be qualified under this act as well as the qualifications of the facility in which the casino is to be located.

b. Any applicant, licensee or any other person who must be qualified pursuant to this act shall provide all information required by this act and satisfy all requests for information pertaining to qualification and in the form specified by the commission. All applicants and licensees shall waive liability as to the State of New Jersey, and its instrumentalities and agents, for any damages resulting from any disclosure or publication in any manner, other than a willfully unlawful disclosure or publication, of any material or information acquired during inquiries, investigations or hearings.

c. All applications, licensees, registrants, intermediary companies, and holding companies shall consent to inspections, searches and seizures and the supplying of handwriting exemplars as authorized by this act and regulations promulgated hereunder.

d. All applicants, licensees, registrants, and any other person who shall be qualified pursuant to this act shall have the continuing duty to provide any assistance or in-

formation required by the commission or division, and to cooperate in any inquiry or investigation conducted by the division and any inquiry, investigation, or hearing conducted by the commission. If, upon issuance of a formal request to answer or produce information, evidence or testimony, any applicant, licensee, registrant, or any other person who shall be qualified pursuant to this act refuses to comply, the application, license, registration or qualification of such person may be denied or revoked by the commission.

e. No applicant or licensee shall give or provide, offer to give or provide, directly or indirectly, any compensation or reward or any percentage or share of the money or property played or received through gaming activities, except as authorized by this act, in consideration for obtaining any license, authorization, permission or privilege to participate in any way in gaming operations.

f. Each applicant or person who must be qualified under this act shall be photographed and fingerprinted for identification and investigation purposes in accordance with procedures established by the commission.

g. All licensees, all registrants, all persons required to be qualified under this act, and all persons employed by a casino service industry licensed pursuant to this act, shall have a duty to inform the commission or division of any action which they believe would constitute a violation of this act. No person who so informs the commission or the division shall be discriminated against by an applicant, licensee or registrant because of the supplying of such information.

Appendix F

5:12-82. Casino license—applicant eligibility

a. No casino shall operate unless all necessary licenses and approvals therefor have been obtained in accordance with law.

b. Only the following persons shall be eligible to hold a casino license; and, unless otherwise determined by the commission with the concurrence of the Attorney General which may not be unreasonably withheld in accordance with subsection c. of this section, each of the following persons shall be required to hold a casino license prior to the operation of a casino in the hotel with respect to which the casino license has been applied for:

(1) Any person who either owns an approved hotel building or owns or has a contract to purchase or construct a hotel which in the judgment of the commission can become an approved hotel building within 30 months or within such additional time period as the commission may, upon a showing of good cause therefor, establish;

(2) Any person who, whether as lessor or lessee, either leases an approved hotel building or leases or has an agreement to lease a hotel which in the judgment of the commission can become an approved hotel building within 30 months or within such additional time period as the commission may, upon a showing of good cause therefor, establish;

(3) Any person who has a written agreement with a casino licensee or with an eligible applicant for a casino license for the complete management of a casino; and

(4) Any other person who has any control over either an approved hotel building or the land thereunder or the operation of a casino.

c. Prior to the operation of the casino, every agreement to lease an approved hotel building or the land thereunder and every agreement for the management of the casino shall be in writing and filed with the commission. No such agreement shall be effective unless expressly approved by the commission. The commission may require that any such agreement include within its terms any provision reasonably necessary to best accomplish the policies of this act. Consistent with the policies of this act:

(1) The commission, with the concurrence of the Attorney General which may not be unreasonably withheld, may determine that any person who does not have the ability to exercise any significant control over either the approved hotel building or the operation of the casino contained therein shall not be eligible to hold or required to hold a casino license;

(2) The commission, with the concurrence of the Attorney General which may not be unreasonably withheld, may determine that any owner, lessor or lessee of an approved hotel building or the land thereunder who does not own or lease the entire approved hotel building shall not be eligible to hold or required to hold a casino license;

(3) The commission shall require that any person or persons eligible to apply for a casino license organize itself or themselves into such form or forms of business association as the commission shall deem necessary or

desirable in the circumstances to carry out the policies of this act;

(4) The commission may issue separate casino licenses to any persons eligible to apply therefor;

(5) As to agreements to lease an approved hotel building or the land thereunder, unless it expressly and by formal vote for good cause determines otherwise, the commission shall require that each party thereto hold either a casino license or casino service industry license and that such an agreement be for a durational term exceeding 30 years, concern 100% of the entire approved hotel building or of the land upon which same is located, and include within its terms a buy-out provision conferring upon the casino licensee-lessee who controls the operation of the approved hotel the absolute right to purchase for an expressly set forth fixed sum the entire interest of the lessor or any person associated with the lessor in the approved hotel building or the land thereunder in the event that said lessor or said person associated with the lessor is found by the commission to be unsuitable to be associated with a casino enterprise;

(6) The commission shall not permit an agreement for the leasing of an approved hotel building or the land thereunder to provide for the payment of an interest, percentage or share of money gambled at the casino or derived from casino gaming activity or of revenues or profits of the casino unless the party receiving payment of such interest, percentage or share is a party to the approved lease agreement; unless each party to the lease agreement holds either a casino license or casino service industry license and unless the agreement is for a dura-

tional term exceeding 30 years, concerns a significant portion of the entire approved hotel building or of the land upon which same is located, and includes within its terms a buy-out provision conforming to that described in paragraph (5) above;

(7) As to agreements for the management of a casino, the commission shall require that each party thereto hold a casino license, that the party thereto who is to manage the casino own at least 10% of all outstanding equity securities of any casino licensee or of any eligible applicant for a casino license if the said licensee or applicant is a corporation and the ownership of an equivalent interest in any casino licensee or in any eligible applicant for a casino license if same is not a corporation, and that such an agreement be for the complete management of the casino, provide for the sale and unrestricted power to direct the casino operations of the casino which is the subject of the agreement, and be for such a durational term as to assure reasonable continuity, stability and independence in the management of the casino;

(8) The commission may permit an agreement for the management of a casino to provide for the payment to the managing party of an interest, percentage or share of money gambled at the casino or derived from casino gaming activity or of revenues or profits of the casino; and,

(9) As to agreements to lease an approved hotel building or the land thereunder, agreements to jointly own an approved hotel building or the land thereunder and agreements for the management of a casino, the commission shall require that each party thereto shall be jointly and severally liable for all acts, omissions and violations of

this act by any party thereto regardless of actual knowledge of such act, omission or violation and notwithstanding any provision in such agreement to the contrary.

d. No corporation shall be eligible to apply for a casino license unless the corporation shall:

(1) Be incorporated in the State of New Jersey, although such corporation may be a wholly or partially owned subsidiary of a corporation which is organized pursuant to the laws of another state of the United States or of a foreign country;

(2) Maintain an office of the corporation in the premises licensed or to be licensed;

(3) Comply with all the requirements of the laws of the State of New Jersey pertaining to corporations;

(4) Maintain a ledger in the principal office of the corporation in New Jersey which shall at all times reflect the current ownership of every class of security issued by the corporation and shall be available for inspection by the commission or the division and authorized agents of the commission and the division at all reasonable times without notice;

(5) Maintain all operating accounts required by the commission in a bank in New Jersey;

(6) Include among the purposes stated in its certificate of incorporation the conduct of casino gaming and provide that the certificate of incorporation includes all provisions required by this act;

(7) If it is not a publicly traded corporation, file with the commission such adopted corporate charter or bylaws provisions as may be necessary to establish the right of the commission to approve future transfers of corporate securities, shares, and other interests in the applicant corporation and in any non-publicly traded holding company, intermediary company, or subsidiary thereof; and, if it is a publicly traded corporation, said corporation shall provide in its corporate charter or bylaws that any securities of such corporation are held subject to the condition that if a holder thereof is found to be disqualified by the commission pursuant to the provisions of this act, such holder shall dispose of his interest in the corporation; provided, however, that, notwithstanding the provisions of N.J.S. 14A:7-12 and N.J.S. 12A:8-101 et seq., nothing herein shall be deemed to require that any security of such corporation bear any legend to this effect; and

(8) If it is not a publicly traded corporation, establish to the satisfaction of the commission that appropriate charter or bylaw provisions create the absolute right of such non-publicly traded corporations and companies to repurchase at the market price or the purchase price, whichever is the lesser, any security, share or other interest in the corporation in the event that the commission disapproves a transfer in accordance with the provisions of this act.

e. No person shall be issued or be the holder of more than three casino licenses. For the purpose of this subsection a person shall be considered the holder of a casino license if such license is issued to such person or if such license is held by any holding, intermediary or subsidiary

company thereof, or by any officer, director, casino key employee or principal employee of such person, or of any holding, intermediary or subsidiary company thereof.

5:12-84. Casino license—applicant requirements

Any applicant for a casino license must produce information, documentation and assurances concerning the following qualification criteria:

a. Each applicant shall produce such information, documentation and assurances concerning financial background and resources as may be required to establish by clear and convincing evidence the financial stability, integrity and responsibility of the applicant including but not limited to bank references, business and personal income and disbursement schedules, tax returns and other reports filed with governmental agencies, and business and personal accounting and check records and ledgers. In addition, each applicant shall, in writing, authorize the examination of all bank accounts and records as may be deemed necessary by the commission or the division.

b. Each applicant shall produce such information, documentation and assurances as may be necessary to establish by clear and convincing evidence the integrity and reputation of all financial backers, investors, mortgagees, bond holders, and holders of indentures, notes or other evidences of indebtedness, either in effect or proposed which bears any relation to the casino proposal submitted by the applicant or applicants. The reputation and integrity of financial sources shall be judged upon the same standards as the applicant. In addition, the applicant shall produce whatever information, documentation or assurance may

be required to establish by clear and convincing evidence the adequacy of financial resources both as to the completion of the casino proposal and the operation of the casino.

c. Each applicant shall produce such information, documentation and assurances of good character as may be required to establish by clear and convincing evidence the applicant's good reputation for honesty and integrity. Such information shall include, without limitation, information pertaining to family, habits, character, criminal and arrest record, business activities, financial affairs, and business, professional and personal associates, covering at least the 10-year period immediately preceding the filing of the application. Each applicant shall notify the commission of any civil judgments obtained against any such applicant pertaining to antitrust or security regulation laws of the Federal government, of this State or of any other state jurisdiction, province or country. In addition, each applicant shall produce letters of reference from law enforcement agencies having jurisdiction in the applicant's place of residence and principal place of business, which letters of reference shall indicate that such law enforcement agencies do not have any pertinent information concerning the applicant, or if such law enforcement agency does have information pertaining to the applicant, shall specify what the information is. If the applicant has conducted gaming operations in a jurisdiction which permits such activity, the applicant shall produce letters of reference from the gaming or casino enforcement or control agency which shall specify the experiences of such agency with the applicant, his associates, and his gaming operation; provided, however, that if no such letters are received within 60 days of request therefor, the applicant may submit a statement under oath that he is or was during the period such activi-

ties were conducted in good standing with such gaming or casino enforcement or control agency.

d. Each applicant shall produce such information, documentation and assurances as may be required to establish by clear and convincing evidence that the applicant has sufficient business ability and casino experience as to establish the likelihood of creation and maintenance of a successful, efficient casino operation. The applicant shall produce the names of all proposed casino key employees as they become known and a description of their respective or proposed responsibilities, and a full description of security systems and management controls proposed for the casino and related facilities.

e. Each applicant shall produce such information, documentation and assurances to establish to the satisfaction of the commission the suitability of the casino and related facilities and its proposed location, and that the proposal will not adversely affect casino operations or overall environmental conditions. Each applicant shall submit an impact statement which shall include without limitation, architectural and site plans which establish that the proposed facilities comply in all respect with the requirements of this act, the requirements of the master plan and zoning and planning ordinances of Atlantic City, without any use variance from the provisions thereof, and the requirements of the "Coastal Area Facility Review Act," P.L. 1973, c. 185 (C. 13:19-1 et seq.), a market impact study which analyzes the adequacy of the patron market and the effect of the proposal on such market and on the existing casino facilities licensed under this act; and an analysis of the effect of the proposal on the overall environment, including, without limitation, economic, social, demographic

and competitive conditions as well as the natural resources of Atlantic City and the State of New Jersey.

5:12-86. Casino license—disqualification criteria

The commission shall deny a casino license to any applicant who is disqualified on the basis of any of the following criteria:

a. Failure of the applicant to prove by clear and convincing evidence that the applicant is qualified in accordance with the provisions of this act;

b. Failure of the applicant to provide information, documentation and assurances required by the act or requested by the commission, or failure of the applicant to reveal any fact material to qualification, or the supplying of information which is untrue or misleading as to a material fact pertaining to the qualification criteria;

5:12-87. Investigation of applicants for casino licenses; order approving or denying license

a. Upon the filing of an application for a casino license and such supplemental information as the commission may require, the commission shall request the division to conduct such investigation into the qualification of the applicant, and the commission shall conduct a hearing thereon concerning the qualification of the applicant in accordance with its regulations.

b. After such investigation and hearing, the commission may either deny the application or grant a casino

license to an applicant whom it determines to be qualified to hold such license.

c. The commission shall have the authority to deny any application pursuant to the provisions of this act. When an application is denied, the commission shall prepare and file an order denying such application with the general reasons therefor, and if requested by the applicant, shall further prepare and file a statement of the reasons for the denial, including the specific findings of facts.

d. After an application is submitted to the commission, final action of the commission shall be taken within 90 days after completion of all hearings and investigations and the receipt of all information required by the commission.

e. If satisfied that an applicant is qualified to receive a casino license, and upon tender of all license fees and taxes as required by law and regulations of the commission, and such bonds as the commission may require for the faithful performance of all requirements imposed by law or regulations, the commission shall issue a casino license for the term of 1 year.

f. The commission shall fix the amount of the bond or bonds to be required under this section in such amounts as it may deem appropriate, by rules of uniform application. The bonds so furnished may be applied by the commission to the payment of any unpaid liability of the licensee under this act. The bond shall be furnished in cash or negotiable securities, by a surety bond guaranteed by a satisfactory guarantor, or by an irrevocable letter of credit issued by a banking institution of this

State acceptable to the commission. If furnished in cash or negotiable securities, the principal shall be placed without restriction at the disposal of the commission, but any income shall inure to the benefit of the licensee.

5:12-88. Renewal of casino licenses

a. Subject to the power of the commission to deny, revoke, or suspend any casino license in force shall be renewed by the commission for the next succeeding license period upon proper application for renewal and payment of license fees and taxes as required by law and the regulations of the commission. The commission shall act upon any such application no later than 30 days prior to the date of expiration of the current license.

b. Application for renewal shall be filed with the commission no later than 90 days prior to the expiration of the current license, and all license fees and taxes as required by law shall be paid to the commission on or before the date of expiration of the current license.

c. Upon renewal of any license the commission shall issue an appropriate renewal certificate or validating device or sticker which shall be attached to each casino license.

82-205

No. 82-197

Office - Supreme Court, U.S.
FILED
SEP 8 1982
ALEXANDER L. STEVAS
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

RESORTS INTERNATIONAL, INC. and

RESORTS INTERNATIONAL HOTEL, INC.

Petitioner,

vs.

NEW JERSEY MONTHLY, and HENDRIX F. C. NIEMANN and CHRISTOPHER LEACH and MICHAEL ARON and TERESA CARPENTER and HARVEY FISHER and ROBERT NARUS, jointly, severally and in the alternative,

Respondents

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

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CONSTITUTIONAL PROVISIONS AND STATUTES

In addition to those constitutional and statutory provisions included at pages 3-4 of the Petitioner's brief, this case also involves the following:

United States Constitution, Amendment I:

"Congress shall make no law respecting an establishment of religion or prohibiting the free exercize thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

New Jersey Constitution (1947), Article I, para. 6:

"Every person may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right. No law shall be passed to restrain or abridge the liberty of speech or of the press. In all prosecutions or indictments for libel, the truth may be given in evidence to the jury; and if it shall appear to the jury that the matter charged as libelous is true, and was published with good motives and for justifiable ends, the party shall be acquitted; and the jury shall have the right to determine the law and the fact."

New Jersey Casino Control Act, New Jersey Statutes Annotated 5:12-107a:

ARTICLE 8. HEARINGS

5:12-107. Conduct of Hearings; Rules of Evidence; Punishment of Contempts; Rehearing

a. At all hearings of the commission in contested cases, as defined in section 2 of P.L.1968 c.410 (C.52:14B-2):

(1) Unless the commission hears the matter directly, the chairman shall refer the matter to the Office of Administrative Law in accordance with P.L.1978, c. 67, (C.52:14F-1 et seq.); provided however, that the chairman may, in his discretion, designate a member of the commission to serve as hearing examiner in a particular matter;

(2) The proceedings at the hearing shall be recorded or transcribed;

(3) Oral evidence shall be taken only upon oath or affirmation;

(4) Each party to a hearing shall have the right to call and examine witnesses; to introduce exhibits relevant to the issues of the case, including the transcript of testimony at any investigative hearing conducted by or on behalf of the commission; to cross-examine opposing witnesses in any matters relevant to the issue of the case; to impeach any witness, regardless of which party called him to testify; and to offer rebuttal evidence;

(5) If an applicant, licensee, registrant or person who shall be qualified pursuant to this act is a party and if such party shall not testify in his own behalf, he may be called and examined as if under cross-examination;

(6) The hearing shall not be conducted according to rules relating to the admissibility of evidence in courts of law. Any relevant evidence may be admitted and shall be sufficient in itself to support a finding if it is the sort of evidence upon which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the

existence of any common law or statutory rule which might make improper the admission of such evidence over objection in a civil action; and

(7) The parties or their counsel may, by written stipulation, agree that certain specified evidence may be admitted, although such evidence may be otherwise subject to objection.

New Jersey Casino Control Act, New Jersey Statutes Annotated, 5:12-108 d.

5:12-108. Proceedings Against Licenses

d. The licensee or registrant shall be entitled to a hearing on the merits if he files the required notice of defense within the time allowed by subsection c. of this section, and any such notice shall be deemed a specific denial of all parts of the complaint not expressly admitted. Failure to timely file the required notice of defense or to appear at the hearing shall constitute an admission of all matters and facts contained in the complaint and a waiver of the licensee's or registrant's rights to a hearing. All affirmative defenses shall be specifically stated, and unless objection is taken as provided in paragraph (4) of subsection c. of this section, all objections to the form of the complaint shall be deemed waived.

COUNTERSTATEMENT OF THE CASE

This is a libel case involving an article entitled "Surrender In Atlantic City" published in the May, 1979 issue of *New Jersey Monthly* magazine. Petitioner's complaint specifies forty statements in the eleven page article as libelous, but to date has not shown these statements to be defamatory, to be inaccurate summaries of testimony at the New Jersey Casino Control Commission hearings, or to even be actionable. On September 11, 1980 after Respondents provided answers to interrogatories and document requests, Petitioners served a Notice of Motion to compel discovery on seven statements in the article. Respondents claimed a privilege to withhold this information based upon the New Jersey Newsperson's Privilege, N.J.S.A. 2A:84A-21, New Jersey Constitution, (1947) Article I, par. 6 and United States Constitution, Amendment I.

Discovery has not proceeded beyond the service and answering of interrogatories and Respondents were precluded by the state trial court from deposing Petitioner's witnesses because of the pendency of the appeal. (Appendix A) On July 19, 1982 Respondents moved for summary judgment on the grounds: a) that Petitioner, as a private corporation, could not prove special damages necessary to maintain its cause of action, *Trenton Mut. Life & F. Ins. Co. v. Perrine*, 23 N.J.L. 402 (Sup. Ct. 1852); b) that Petitioner could not prove that various statements are defamatory or of and concerning Petitioner; and c) that the opinion and rhetorical hyperbole privileges protected many of the statements at issue; *See Kotlikoff v. The Community News*, 89 N.J. 62 (1982). (Appendix B) This motion is currently pending and will completely dispose of this case if decided in Respondent's favor.

SUMMARY OF ARGUMENT

1. Respondents' first argument in opposition to this petition is that Petitioner's reputational interest, without a coinciding state denial of its Casino License, does not constitute a liberty or property interest protected by the Fourteenth Amendment.

2. Respondents' second argument is that the N.J. Supreme Court's interlocutory decision on this discovery issue is not final since it does not foreclose further proceedings including a full trial on the merits.

3. Respondents' last argument is that jurisdiction does not lie to review the New Jersey Supreme Court decision because of Petitioner's failure to assert its federal claim in the State courts.

ARGUMENT

Point I

Certiorari Should Not Issue Because The Decision Below Accords With Established Precedent Denying Federal Constitutional Protection To Private Reputation

In holding the N.J. Shield Law to be absolute in libel cases, the New Jersey Supreme Court applied the principle set forth in *Branzburg v. Hayes*, 408 U.S. 665, 706 (1972), in which this Court decreed the states free to adopt legislation and construe their own constitutions to recognize a newsman's privilege, either qualified or absolute. *Maressa v. New Jersey Monthly*, 89 N.J. 189 (Page 18a of Petitioner's Appendix). The New Jersey Supreme Court also recognized that *Herbert v. Lando*, 441 U.S. 153 (1979) does not prohibit the enactment of evidentiary rules incorporating a "reporter's privilege" or Shield Law. Since this case therefore involves only the construction of a state statutory privilege by the state's highest court, it cannot be reviewed in the federal courts. *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829 (1978).

The decision below does not impede or infringe upon any constitutional interest of Petitioner or any other libel plaintiff. While an individual's interest in his reputation is a basic concern, its reflection in defamation law and the existence of a judicial remedy for injury thereto is entirely a matter of state law. *Paul v. Davis*, 424 U.S. 683, 712 (1976); *Mazzella v. Philadelphia Newspapers*, 479 F. Supp. 523, 527 (E.D.N.Y. 1979). Due process guarantees are required only when the defamation occurs in immediate connection with denial of a right or status recognized under state law. *Paul v. Davis*, 434 U.S. 711-712; *Codd v. Velger*, 429 U.S. 624, 628 (1977); *Moore v. Otero*, 557 F.2d 435, 437 (5th Cir. 1978). All cases cited in Petitioner's brief support this principle: *Owen v. City of Independence*, 445 U.S. 622, 633 n. 13 (1979). (Petitioner deprived of liberty interest since defamatory charges occurred in course of termination of employment); *United States v. Lovett*, 328 U.S. 303 (1946) (Involving a Congressional proscription of these employees

prohibiting their ever holding a government job); *Goss v. Lopez*, 419 U.S. 565 (1975) (suspension from school based upon charges of misconduct triggers procedural guarantees of the Fourteenth Amendment); *Wisconsin v. Constantineau*, 400 U.S. 433 (1975) (The alteration of legal status combined with the injury resulting from the defamation, justified the invocation of procedural safeguards.); *Board of Regents v. Roth*, 408 U.S. 564, 573 (1972) ("The state in declining to rehire the respondent, did not make any charge against him that might seriously damage his standing and associations in the community."); *Arnett v. Kennedy*, 416 U.S. 134, 157 (1974) ("The liberty here implicated by appellant's action is . . . dismissal based upon an unsupported charge which could wrongfully injure the reputation of an employee.")

Petitioner does not claim to have been deprived of its casino license since the May 1979 publication of "Surrender In Atlantic City" and has in fact received three successive license renewals. Instead it speculates: "If their reputation does not remain intact, then neither will they be able to attain the license from the state that will allow them to operate." (Page 10 of the Petitioner's brief). Petitioner's prayer for *certiorari* is premature since there has been no state action to detrimentally alter it's status as a licensed New Jersey casino. *Anti-Facist Comm. v. McGrath*, 341 U.S. 123. Even if Petitioner's license were to be terminated, it is guaranteed procedural due process by the *Casino Control Act*, (N.J.S.A. 5:12-107, 108).

State Law controls the result in this case since no federal question is presented. *Jankovich v. Indiana Toll Road Commission*, 379 U.S. 487 (1965); *Henry v. Mississippi*, 379 U.S. 433 (1965).

Point II

A Writ of Certiorari Should Not Issue Because The New Jersey Supreme Court Judgment Below Is Not Final

Even assuming that Petitioner has an interest entitled to federal constitutional protection, the decision below did not immediately or irreparably affect it. As an interlocutory decision on a discovery issue, the state court decision below contemplates further proceedings including the possibility of a full trial which will neither preclude nor require a decision on the federal issue.

Petitioner's right to defend its reputation has not been foreclosed since "An absolute Shield Law privilege gives newspersons less than absolute immunity from suit." *Maressa v. New Jersey Monthly*, 89 N.J. 198, (Page 29a, Petitioner's Appendix). When a defamatory report is published and reliance is claimed solely on confidential sources, trial courts must consider whether the circumstances of the publication warrant submission of the actual malice issue to the jury. A sufficient inference of actual malice can arise where a false report is published solely in reliance on confidential sources and: (1) the content of the report is such as to be defamatory as a matter of law; (2) the defendant knew or should have known of some reasonable means to verify accuracy; and (3) the failure to verify rises to the level of a gross violation of the standards of responsible journalism. When such recklessness approaches the level of publishing a knowing falsehood, the issue must be submitted to the jury. *Maressa v. New Jersey Monthly*, 89 N.J. 176, 199-200, (Page 29a-30a, Petitioner's Appendix).

If Petitioner succeeds on the merits at trial, its claim of injury to reputation would be mooted. This possibility implicates the rule against the rendering of advisory opinions and weighs heavily against a finding of finality. *Pope v. Atlantic C.L.R. Co.*, 345 U.S. 379 (1953). Should Petitioner's complaint be dismissed upon Respondents' summary judgment motion, or if Petitioner should be unsuccessful at trial, it can preserve the Shield Law issues while appealing other grounds through the New Jersey state appellate process. Thereafter, if necessary, it may seek further review of any Federal issues in this Court. *Urie v. Thompson*, 337 U.S. 163, 171-73 (1949).

Since the New Jersey Supreme Court judgment below contemplates further proceedings of substance in the state courts and does not conclusively decide the questionable federal issue presented for review, the petition for certiorari should be denied. *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975).

Point III

Plaintiff's Failure to Specifically Assert A "Reputation Plus" Interest Below Requires The Denial of Certiorari

Jurisdiction of the United States Supreme Court cannot be invoked on the grounds of denial of a Constitutional right unless that right is specifically claimed in the proceedings below. The federal claim cannot be a matter of mere inference but requires averments so distinct and positive as to place it beyond doubt that the federal right has been asserted in the state courts. *Union Mut. Life Ins. Co. v. Kirchoff*, 169 U.S. 103 (1898).

It is the duty of the party seeking review by writ of certiorari to demonstrate that this Court has jurisdiction to grant the writ and review the case. *Department of Mental Hygiene v. Kirchner*, 380 U.S. 194, 197 (1965). In response to Respondent's argument below that the New Jersey Shield Law is absolute in defamation cases, Petitioner failed to aver in the state courts a "federal right to vindicate its reputation which is unalterably tied to another state-created right". This petition for certiorari is thus fatally defective and fails to comply with Sup. Ct. R. 21.1(h) which requires the petition to indicate the stage in the proceedings in the state trial and appellate courts at which petitioner's asserted federal claims were raised and disposed of, with accompanying citations to the record below.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for Writ of Certiorari be denied.

Respectfully submitted,

By: _____

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Guliet D. Hirsch
On the Petition

APPENDIX A

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Attorney for Plaintiffs

SUPERIOR COURT
OF NEW JERSEY
LAW DIVISION
ATLANTIC COUNTY
DOCKET NO. L-43602-79

Civil Action
ORDER
To Stay Order 7-7-81 and For
Protective Order, etc.

RESORTS INTERNATIONAL, INC.
a corporation organized and
existing under the laws of the
State of Delaware, et al.,

Plaintiffs,

v.

NJM ASSOCIATES, a New Jersey
limited partnership, doing business
as the NEW JERSEY MONTHLY, et al.,

Defendants.

This matter having been opened to the Court by Brener, Wallack & Hill, attorneys for defendants (Guliet D. Hirsch, appearing) on applications for an order compelling the production of James M. Crosby, I.G. Davis, Charles E. Murphy, Jr., Esq. and Robert Peloquin for depositions and for an order staying this Court's Order of July 7, 1981 rendered in this matter and compelling defendants to provide full and responsive answers to Interrogatories and to compel production of documents pursuant to the formal Opinion of the Court dated July 1, 1981 and on an application by Sterns, Herbert & Weinroth, P.A., attorneys for plaintiffs (Mark D. Schorr, appearing), for an order staying the depositions of James M. Crosby, I.G. Davis, Charles E. Murphy, Jr., Esq. and Robert Peloquin until such time as defendants' interlocutory appeals from the aforementioned July 7, 1981 Order of this Court are finally disposed of or, in the alternative, for an order staying this action until defendants' appeals from this Court's July 7, 1981 order are finally disposed of, and the Court having considered the arguments of counsel on July 29, 1981, the moving and answering papers and the briefs submitted on behalf of the parties, and having issued its ruling and opinion on the record on July 29, 1981, which ruling and opinion are incorporated herein by reference, and good cause appearing for the entry of this Order;

It is ORDERED on this 5th day of August, 1981, that:

1. This Court's Order of July 7, 1981 in this matter compelling discovery of defendants' confidential sources and other bases for the article which is the subject of this litigation shall be and hereby is stayed until such time as the Appellate Division either finally disposes of defendants' Motion for Leave to Appeal from the aforementioned July 7, 1981 Order or grants the Motion for Leave to Appeal and finally disposes of that appeal and the issues raised thereon;

2. Plaintiffs' application for a protective order staying the depositions of James M. Crosby, I.G. Davis, Charles E. Murphy, Jr., Esq. and Robert Peloquin shall be and hereby is granted, the stay to remain in effect until such time as the Appellate Division either finally denies defendants' Motion for Leave to Appeal the aforementioned July 7, 1981 Order or grants the Motion for Leave to Appeal and finally disposes of that appeal and the issues raised thereon; and

3. Should the Supreme Court of New Jersey grant certification of defendants' appeal from this Court's July 7, 1981 Order while that appeal is pending unheard in the Appellate Division, either party may make application for a modification of the within Order.

L. Anthony Gibson, J.S.C.

APPENDIX B

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Attorneys for Defendant

SUPERIOR COURT
OF NEW JERSEY
ATLANTIC COUNTY
DOCKET NO. L-43602-79

CIVIL ACTION
NOTICE OF MOTION

Plaintiff
RESORTS INTERNATIONAL, INC., et al.

VS.

Defendant
N.J.M. ASSOCIATES, et al.

TO: MARK D. SCHORR, ESQUIRE
Sterns, Herbert & Weinroth
186 West State Street
Trenton, New Jersey 08607

PLEASE TAKE NOTICE that on August 6, 1982, at 9:00 a.m. or as soon thereafter as counsel may be heard, the undersigned attorney for Defendants will make application to the Superior Court, Law Division, Atlantic County, at the Atlantic County Courthouse in Atlantic City, New Jersey, for Summary

Judgment. Annexed hereto in support of this motion for Summary Judgment is a Brief and Appendix under separate cover.

BRENER, WALLACK & HILL
Attorney for Defendants

By _____
Guliet D. Hirsch

Dated: July 19, 1982